

TICKETMASTER CORP. V. TICKETS.COM, INC.: PRESERVING MINIMUM REQUIREMENTS OF CONTRACT ON THE INTERNET

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Courts have applied various legal frameworks to the Internet and the behavior of its users, such as real property, telecommunications, and intellectual property. This patchwork of legal doctrines has made it difficult for decisionmakers to weigh the competing standards that these frameworks require. With the goal of encouraging the Internet to grow through financial and intellectual investment, a natural solution may be to avoid legal intervention and let the market decide. This is happening now as the law increasingly allows the private ordering of online entitlements. But as online contracts have expanded to cover different types of exchanges and parties, they have mutated beyond traditional models of contract formation. As contract law shapes the Internet, courts must step in to keep website providers from placing restraints on unknowing users.

This Note examines Ticketmaster's attempts to restrict the behavior of its competitor, Tickets.com, through litigation based upon a private property conception of its website, access to which was regulated by contract. In particular, this Note questions the validity of Ticketmaster's browsewrap license. Part I briefly outlines the background of the case and details the district court's summary judgment decisions on Ticketmaster's trespass to chattels, copyright, and contract claims. Part II discusses how traditional contract law has been applied to Internet contracts. Part III proposes a validity analysis for browsewrap licenses that is based on the traditional contract model. It suggests that online contracts must involve a meaningful exchange, which entails clear offer and acceptance. It also applies this theory of online agreements to Ticketmaster's license and explores the impact of this validity determination.

I. CASE SUMMARY

A. Facts and Procedural History

The plaintiffs, Ticketmaster Corporation and Ticket Online-CitySearch, Inc. ("TM"), competed with the defendant, Tickets.com

("TX"), in selling tickets online for concerts, sports, and other events.¹ TM, the largest player in this industry,² acted as the exclusive ticket vendor for more than 25,000 events annually in the United States.³ TX also sold tickets for many events, but its business model focused on supplying information for as many events as possible whether or not it sold tickets for the events.⁴

Anyone surfing the Internet could access the TM and TX websites. Both websites contained home pages with links to interior webpages, called "event pages," that gave basic information about events.⁵ Each event page had a separate Internet address, or Uniform Resource Locator (URL), which could be accessed directly by the public.⁶ The TM event pages provided information and sold tickets exclusively for the events it covered.⁷ The TX event pages also listed information and sold tickets for events. Regarding events it did not sell tickets for, the TX event pages provided information and listed alternative ticket brokers and often "deep linked"⁸ to the interior webpages of competing ticket providers like TM.⁹

In addition to deep linking, TX used software programs called "spiders"¹⁰ to collect information from the event pages of competing ticket

1. Ticketmaster Corp. v. Tickets.com, Inc., No. CV997654HLHVBKX, 2003 WL 21406289, at *1 (C.D. Cal. Mar. 7, 2003) [hereinafter *Ticketmaster II*].

2. TM provides ticket sales, distribution, management, and accounting services for hundreds of sporting franchises, arenas, stadiums, theatres, and other venues in the United States, Canada, and other international locations. Appellee Tickets.com, Inc.'s Brief at *6, Ticketmaster Corp. v. Tickets.com, Inc., 2 Fed. Appx. 741 (9th Cir. Jan. 22, 2001) (No. 00-56574), at 2000 WL 33986981.

3. Ticketmaster Corp. v. Tickets.com, Inc., No. 99CV7654, 2000 WL 1887522, at *1 (C.D. Cal. Aug. 10, 2000) [hereinafter *Ticketmaster I*].

4. See *Ticketmaster II*, 2003 WL 21406289, at *1.

5. *Id.*

6. *Id.*

7. See Ticketmaster Purchase Policies, at <http://www.ticketmaster.com/h/purchase.html> (last visited Mar. 2, 2004).

8. A "hyperlink" allows Internet users to move from one webpage to another by clicking the mouse on it, without having to type the webpage's URL in their web browser's window. See *Reno v. ACLU*, 521 U.S. 844, 852 (1997). "Deep links" are hyperlinks that connect to webpages deep within a website, skipping the website's homepage and other pages within the site. Appellant's Opening Brief, *supra* note 2, at *7 n.6.

9. *Ticketmaster II*, 2003 WL 21406289, at *1.

10. Data search and collection programs, also known as "spiders" or "web bots," are programs designed to rapidly search numerous webpages or sites, collecting, retrieving, and indexing information from these pages. Their uses include creation of searchable databases, web catalogues and comparison shopping services. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1060-61 (N.D. Cal. 2000); *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1354 n.4 (2003); see also Niva Elkin-Koren, *Let the Crawlers Crawl: On*

providers like TM.¹¹ This practice of “spidering” is common on the web—some search engines, for example, use spiders to collect and catalog data from public websites.¹² TX’s spiders temporarily loaded event pages into the random access memory (RAM) of TX’s computers.¹³ TX then extracted information (e.g., event time, location, ticket prices, and TM URL) and discarded the rest (e.g., TM logo and ads).¹⁴ TX displayed the extracted event facts on its event pages.¹⁵

In 2000, TM filed suit to enjoin TX from spidering and linking to its event pages.¹⁶ The district court denied TM’s motion for preliminary injunction,¹⁷ and the Ninth Circuit affirmed.¹⁸ Subsequently, TM narrowed its suit to three claims: (1) trespass to chattels, (2) copyright infringement, and (3) breach of contract.¹⁹ TX moved for summary judgment on these claims. The district court granted summary judgment dismissing the trespass to chattel and the copyright claims but found triable issues of fact on the contract theory.²⁰

B. Court’s Analysis and Conclusions

1. *Trespass to Chattels*

TM claimed that TX committed trespass to chattels both by deep linking to TM’s interior webpages and by sending spiders to extract informa-

Virtual Gatekeepers and the Right to Exclude Indexing, 26 U. DAYTON L. REV. 179, 187 (2001); Maureen A. O’Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561, 570-71 (2001) [hereinafter O’Rourke, *Property Rights*]; Laura Quilter, Note, *The Continuing Expansion of Cyberspace Trespass to Chattels*, 17 BERKELEY TECH. L.J. 421, 423-24 (2002).

11. *Ticketmaster II*, 2003 WL 21406289, at *2. TX used spiders on TM’s site from 1998 to July 2001. *Id.*

12. See sources cited *supra* note 10. TX asserted that spiders cannot collect information from a website that limits access, such as sites that require registration for access. Appellee Tickets.com, Inc.’s Brief, *supra* note 2, at *10. For an example of a website with restricted access, which a spider could not get into, see The New York Times Website, at <http://www.nytimes.com>.

13. TX stored the copy in RAM for periods of 10-15 seconds. *Ticketmaster II*, 2003 WL 21406289, at *2.

14. *Id.*

15. *Id.*

16. *Ticketmaster I*, No. 99CV7654, 2000 WL 1887522, at *1 (C.D. Cal. Aug. 10, 2000).

17. *Id.*

18. *Ticketmaster Corp. v. Tickets.com Inc.*, 2001 WL 51509, at *1 (9th Cir. Jan. 22, 2001) (unpublished).

19. *Ticketmaster II*, 2003 WL 21406289, at *1.

20. *Id.*

tion from TM's site. The court rejected these arguments because TM failed to show actual damage to its property.²¹ A trespass to chattels claim requires two elements: (1) unauthorized use of or interference with another's personal property and (2) a resulting injury.²² The court "respectfully disagree[d]" with courts that found that "mere use of a spider to enter a publically [sic] available web site to gather information, without more, is sufficient to fulfill the harm requirement for trespass to chattels."²³ It refused to acknowledge that TM's expenditures on self-help efforts to prevent TX from accessing its site caused harm to TM.²⁴ The court also rejected TM's argument that it had an absolute right to exclude others from using or intermeddling with its personal property, its webpages, regardless of how minimal the impairment.²⁵

On the first trespass element of unauthorized interference, courts have held that sending electronic signals through a computer network is a "physical" contact or interference.²⁶ Regarding the damages element, courts have begun to require plaintiffs to show that the interference causes actual damage or impairment to the computer system.²⁷ In the past, however, courts defined damage expansively, finding it where the interference used some of the capacity of the plaintiffs' computer systems²⁸ or where

21. *Id.* at 3.

22. *See* Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1566 (1996).

23. *Ticketmaster II*, 2003 WL 21406289, at *3.

24. *Id.*

25. *See id.*; Appellant's Opening Brief, *supra* note 2, at *13 ("[TM] has an absolute right to exclude others from using or intermeddling with its personal property, including [TM's] computers, regardless of the amount of impairment.").

26. *See* Hotmail Corp. v. Van\$ Money Pie, Inc., 47 U.S.P.Q.2d (BNA) 1020, 1025 (N.D. Cal. 1998) (entering injunction for a trespass where defendant transmitted unauthorized electronic signals to plaintiff's computers); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) (finding trespass where defendants made unauthorized commercial use of plaintiff's computers); *Thrifty-Tel*, 46 Cal. App. 4th at 1566 n.6 (finding intentional interference where defendants tampered with intangible computer access codes).

27. *See CompuServe*, 962 F. Supp. at 1023 (stating "that the tort of trespass to chattels requires some actual damage as a prima facie element, whereas damage is assumed where there is a trespass to real property"); *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1352 (2003) ("The dispositive issue in this case, therefore, is whether the undisputed facts demonstrate [defendant's] actions caused or threatened to cause damage to [plaintiff's] computer system, or injury to its rights in that personal property . . ."); *Thrifty-Tel*, 46 Cal. App. 4th at 1564 (reversing the trial court's finding of trespass because plaintiff "presented no evidence of any actual losses").

28. *See* Oyster Software, Inc. v. Forms Processing, Inc., No. C-00-0724 JCS, 2001 WL 1736382, at *12-13 (N.D. Cal. Dec. 6, 2001) (stating that a plaintiff need only prove that defendant's conduct amounted to "use" of plaintiff's computer to show an intentional

plaintiffs spent resources to shield their computer networks from unwanted transmissions.²⁹

The *Ticketmaster* court, however, held that trespass to a computer by spidering required some tangible interference with the use or operation of the computer.³⁰ Although the court acknowledged that a plaintiff may be harmed by cumulative spidering, it maintained that the plaintiff must prove a minimum threshold of actual damage to its computer systems.³¹ The court's decision may have been based in part on its reluctance to expand the trespass doctrine to the Internet where it could "threaten[] basic Internet function" and because there were "flaws inherent" in applying doctrines based in property law to the Internet.³²

2. Copyright

TM argued TX had infringed its copyrights by (1) copying TM event page URLs, (2) temporarily copying event pages with spiders, and (3) displaying TM event pages framed by TX event pages. The court granted TX's motion for summary judgment eliminating all the copyright claims.³³

interference causing injury for purposes of trespass to chattels, even if use was "negligible"); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1071 (N.D. Cal. 2000) (holding that defendant "caused injury" by "depriv[ing] [plaintiff] of the ability to use that portion of its personal property for its own purposes"); *Hotmail*, 47 U.S.P.Q.2d (BNA) at 1022; *CompuServe*, 962 F. Supp. at 1022; *Zaslow v. Kroenert*, 29 Cal. 2d 541, 551 (1946) (holding that plaintiff must show injury to get damages, but must prove only repeated trespass for an injunction); see also Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401 (1998).

29. See *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (including in damages money spent separating e-mails); *Hotmail*, 47 U.S.P.Q.2d (BNA) at 1025 (same).

30. *Ticketmaster II*, 2003 WL 21406289, at *3 (citing the RESTATEMENT (SECOND) OF TORTS § 219 (1965) (maintaining that trespass to chattels requires a showing that "the chattel is impaired as to its condition, quality, or value")).

31. *Id.*

32. *Id.* ("[W]hat is being attempted is to apply a medieval common law concept in an entirely new situation which should be disposed of by modern law designed to protect intellectual property interests.") (citing Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1283-84 (2002); Clifton Merrell, Note, *Trespass to Chattels in the Age of the Internet*, 80 WASH. U. L.Q. 675 (2002); Quilter, *supra* note 10; Mary Anne Bendotoff & Elizabeth R. Gosse, *Stay Off My Cyberproperty!: Trespass to Chattels on the Internet*, 6 INTELL. PROP. L. BULL. 12 (2001)).

33. *Ticketmaster II*, 2003 WL 21406289, at *5.

a) URLs

TM first argued that TX illegally copied the URLs of its event pages. TM claimed that URLs are copyrightable creative expression³⁴ because they consist of a unique chain of characters that TM selected for their conceptual elegance, descriptive content, and perceived understandability by users.³⁵ The court disagreed, finding that URLs are facts because they describe the location of a webpage, like a street address.³⁶ As “the electronic address of the information,”³⁷ a URL consists solely of functional, factual and not original elements.³⁸ Looking to the Supreme Court’s opinion in *Feist Publications v. Rural Telephone Service*,³⁹ the court reasoned that the Copyright Act does not afford protection for facts, raw data, or functional design elements.⁴⁰ In *Feist*, the Court reaffirmed that originality is required in all copyrighted works, removing databases and other labor intensive but unoriginal materials from copyright protection.⁴¹ Purely factual compilations demonstrating no creative selection, coordination, or arrangement are not protected.⁴² Although the necessary degree of original-

34. The considerations TM used in developing URLs (e.g., descriptive content and understandability) meet the definition of nonprotectable “functional elements” of computer systems proffered by the Ninth Circuit, given that the court’s focus on whether the expression is chosen based on “efficiency,” “compatibility requirements,” or “industry demands.” *Sony Computer Co. v. Connectix Corp.*, 203 F.3d 596, 602-03 (9th Cir. 2000) (quoting *Sega Ent., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992), which defined “functional elements” as “logical, structural, and visual display elements that are dictated by the function to be performed, by considerations of efficiency, or by external factors such as compatibility requirements and industry demands”).

35. Appellant’s Opening Brief, *supra* note 2, at *5.

36. *Ticketmaster II*, 2003 WL 21406289, at *5.

37. THE BLUEBOOK: A UNIFORM SYSTEM OF Citation R. 18.2.1(c), at 134 (Columbia Law Review Ass’n et al. eds., 17th ed. 2000).

38. *Ticketmaster II*, 2003 WL 21406289, at *5.

39. 499 U.S. 340 (1991).

40. *Ticketmaster II*, 2003 WL 21406289, at *5.

41. In *Feist*, a telephone directory publisher, Rural, sued its competitor, Feist, for copyright infringement of the names and addresses from its directory. *Feist*, 499 U.S. at 344. The Supreme Court rejected the infringement claim, because Rural had no copyright interest in its directory. *Id.* at 362-63. The Court emphasized that “some creative spark” of originality is a constitutional requirement of copyright. *Id.* at 343. The Court reasoned that Rural’s selection, coordination, and alphabetical arrangement of its listings were obvious and logical, and accordingly, did not satisfy this minimum constitutional standard for copyright protection. *Id.* at 362-63.

42. The “sweat of the brow” doctrine conferred copyright protection to compilers of facts or ideas because they had made the effort to gather such information. Jordan M. Blanke, *Vincent Van Gogh, “Sweat of the Brow,” and Database Protection*, 39 AM. BUS. L.J. 645, 651-52 (2002) (describing how the Copyright Act of 1976 separated copyright in the selection and arrangement of materials from copyright in the underlying context,

ity required by the Copyright Act is low,⁴³ URLs are not copyrightable because they are functional facts.⁴⁴ The court concluded that without copyright protection, there cannot be infringement of the URLs.⁴⁵

b) Temporary Copies

TM next claimed that when TX made temporary copies of TM's event pages it infringed TM's copyright in those pages. The court, however, held that TX's practice was a fair use.⁴⁶ The court determined that TX had no other way to obtain factual data from the webpages besides making temporary copies.⁴⁷ Furthermore, although TX copied TM's event pages, the copies were not used competitively and were erased after use. The court analogized to *Sony Computer Entertainment* and *Sega*, in which the Ninth Circuit held that copying is fair use when necessary to gain access to the functional elements of copyrighted software.⁴⁸ In those cases, the defendants reverse engineered temporary copies of plaintiff's copyrighted software to access unprotected elements of the source code. The *Ticketmaster* court held that that TX had similarly copied TM's event pages in order to access unprotected information.⁴⁹

In addition to the necessity argument, the court also examined the fair use factors to conclude that TX's temporary copies were fair use.⁵⁰ When determining whether a defendant's practice is a fair use, the Copyright Act

and thus overruled courts that found "directories and other such compilations . . . copy-rightable per se").

43. *See, e.g.*, *Belford, Clark & Co. v. Scribner*, 144 U.S. 488 (1892) (holding original aspects of recipe book protectable); *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977 (7th Cir. 1997) (holding that a listing of 5-digit codes to identify dental procedures contained copyrightable expression); *Southco, Inc. v. Kanebridge Corp.*, 53 U.S.P.Q.2d 1490 (E.D. Pa. 2000) (holding that 9-digit product identification numbers were sufficiently original to gain copyright protection).

44. *Ticketmaster II*, 2003 WL 21406289, at *5.

45. *Id.* ("There appears to be no cases holding the [sic] URLs to be subject to copyright. On principle, they should not be.")

46. 17 U.S.C. § 107 (2000) (codifying the fair use defense to copyright infringement), which protects certain educational and scientific uses of copyrighted works); *see also Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1526-27 (9th Cir. 1992) (copying entire copyrighted computer program to gain access to unprotected functional elements was fair use).

47. Appellee Tickets.com, Inc.'s Brief, *supra* note 2, at *12.

48. *Ticketmaster II*, 2003 WL 21406289, at *5 (citing *Sony Computer Co. v. Connectix Corp.*, 203 F.3d 596, 600 (9th Cir. 2000) (holding that copying for reverse engineering to obtain nonprotectable information is permitted by the fair use doctrine in certain circumstances)); *Sega*, 977 F.2d at 1526-27.

49. *Ticketmaster II*, 2003 WL 21406289, at *4.

50. *Id.* at *5.

directs courts to consider four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵¹ The court held that the first factor weighed against a finding of fair use because the purpose of TX's use was commercial and "only slightly transformative."⁵² The second factor, however, weighed in favor of fair use because TM's event pages were commercial webpages that sold tickets and posted advertisements. Therefore, the nature of TM's work was more commercial information than pure creative expression. The third factor was "of little" weight on the question of the fairness of temporary copying, because TX's final webpage "did not contain any infringing material."⁵³ Finally, the fourth factor also weighed in favor of fair use because there was no market for the original work, TM's event page.⁵⁴ Thus, TX's use had negligible effect on the market for the original work.

In conclusion, the court both examined precedent allowing copyists to extract noncopyrightable elements and weighed the four fair use factors to hold that TX's temporary copying of TM's event pages was fair use.⁵⁵

c) Framing

In TM's final copyright claim, it argued that by deep linking to TM's event pages and framing these pages, TX infringed TM's public display and reproduction rights.⁵⁶ The court rejected this argument because TX did not intend to frame TM's event pages. Rather, framing occurred because of a user's individual browser settings. Thus, the framing happened inconsistently and not through the fault of TX. Further, TX clearly indicated to users that the deep link took the user to a different website.⁵⁷ The *Ticketmaster* court distinguished the Ninth Circuit's holding in *Kelly v. Arriba Soft*, which stated that linking to and framing copyrighted photographs could violate the plaintiff's public display right.⁵⁸ In *Kelly*, the de-

51. 17 U.S.C. § 107; see *Connectix*, 203 F.3d at 602 & n.5.

52. *Ticketmaster II*, 2003 WL 21406289, at *5.

53. *Id.*

54. *Id.*

55. See *id.*

56. *Ticketmaster II*, 2003 WL 21406289, at *6 (citing 17 U.S.C. § 106(1), (5)).

57. The deep link said, "Buy this ticket from another online ticketing company. Click here to buy tickets. These tickets are sold by another ticketing company. Although we can't sell them to you, the link above will take you directly to the other company's web site where you can purchase them." *Id.*

58. *Id.* (citing *Kelly v. Arriba Soft*, 280 F.3d 934 (9th Cir. 2002)). This distinction may have been prescient, as the Ninth Circuit later withdrew its original opinion in *Kelly*,

defendant had purposely framed the plaintiff's photographs on its website along with the defendant's own images and advertisements.⁵⁹ In contrast, the *Ticketmaster* court found that TX linked to TM's event pages but neither imported them onto its own website nor tried to pass off TM's event pages as its own.⁶⁰

3. Contract

TM claimed that TX breached a contract—reachable by a hyperlink on the TM home page—which imposed use restrictions on all users of its webpages.⁶¹ The license stated that anyone visiting pages beyond the home page agreed not to deep link interior webpages, use automated programs like spiders on the site, or use information obtained from the site for commercial purposes.⁶² TX had seen this license several times on the website and had communicated about it with TM representatives.⁶³ The court concluded:

[T]here is sufficient evidence to defeat summary judgment on the contract theory if knowledge of the asserted conditions of use was had by TX,⁶⁴ who nevertheless continued to send its spider into the TM interior web pages, and if it is legally concluded that doing so can lead to a binding contract.⁶⁵

TM's contract claim is the only claim which survived summary judgment.⁶⁶

II. LEGAL BACKGROUND OF CONTRACTS ON THE INTERNET

This Part outlines the legal treatment of shrinkwrap, clickwrap, and browsewrap licenses. Website providers commonly use two types of contracts to impose standard terms and conditions for the online sale of goods and services. The first type, a "clickwrap" license, provides notice of

and reversed the district court's finding of infringement of the display right, albeit on the ground that the district court had improperly considered this issue on *Kelly's* summary judgment. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003).

59. *Ticketmaster II*, 2003 WL 21406289, at *6.

60. *Id.*

61. *Id.*

62. Appellant's Opening Brief, *supra* note 2, at *6-7.

63. *Id.*

64. TM claimed that representatives of TX viewed the TM license at least seven times before litigation was filed. *Id.* at *7.

65. *Ticketmaster II*, 2003 WL 21406289, at *2.

66. *Id.* at *1.

terms and conditions in a pop up textbox, which requires users to assent to the agreement by clicking on an icon.⁶⁷ Without clicking on the agreement, users cannot obtain the good or service provided by the website. With the second type of contract, a "browsewrap" license, the website provides notice of terms and conditions by placing a hyperlink on the home page that reads, for example, "Terms of Use." Users do not bind themselves to browsewrap licenses through express assent like clicking an icon. But instead users bind themselves by some other conduct prescribed in the license, such as visiting interior pages on the site.⁶⁸ In any case, users are not required to view the license.⁶⁹

Courts, when determining the validity of clickwrap and browsewrap licenses, have analogized them to "shrinkwrap" licenses. "Shrinkwrap" licenses were originally developed to protect software products where intellectual property protection fell short.⁷⁰ These licenses were included on a piece of paper placed inside the transparent plastic, or shrinkwrap, enclosing the product.⁷¹ Customers bound themselves to the license terms by opening and using the software product.⁷² Shrinkwrap licenses now include, for example, textboxes appearing when software is loaded, that prevent a consumer from proceeding without indicating acceptance of the license terms.⁷³ This form of shrinkwrap license functions much like a clickwrap license. But shrinkwrap licenses apply to store-bought software while clickwrap licenses apply to Internet transactions.

A. Validity of Shrinkwrap and Clickwrap Licenses

Courts have generally upheld the validity of shrinkwrap and, by analogy, clickwrap licenses. The law treats clickwrap and shrinkwrap licenses as types of mass market licenses, which are form contracts that accompany

67. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 22 & n.4 (2d Cir. 2002).

68. *Id.* at 23 (describing Netscape's browsewrap license); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (defining browsewrap license by comparing them to clickwrap licenses).

69. Maureen O'Rourke, *Common Law and Statutory Restrictions on Access: Contract, Trespass, and the Computer Fraud and Abuse Act*, 2002 U. ILL. J.L. TECH. & POL'Y 295 [hereinafter O'Rourke, *Common Law*].

70. See Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 (1995) [hereinafter Lemley, *Shrinkwrap Licenses*].

71. *Id.*

72. *Id.*

73. See, e.g., Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 339-40 (1996) (discussing the change in the form of shrinkwrap licenses).

information products and define how the products can be used.⁷⁴ Article 2 of the Uniform Commercial Code (U.C.C.) governs mass market licenses, and it provides for enforcement of shrinkwrap licenses by stating that contract formation can occur in any manner that shows agreement.⁷⁵ Indeed, according to the U.C.C., state statutes, and common law, the touchstone of a valid contract is mutual manifestation of assent, whether it occurs by writing, spoken word, or conduct.⁷⁶ A party can assent to an agreement through conduct by using the services or other consideration offered by the other party,⁷⁷ but only if the first party knew or should have known the terms and conditions.⁷⁸

The leading case on shrinkwrap license validity is *ProCD v. Zeidenberg*.⁷⁹ In *ProCD*, the Seventh Circuit reasoned that a software manufac-

74. See Stephen T. Keohane, *Mass Market Licensing*, in PATENT & HIGH TECHNOLOGY LICENSING 437, 443 (PLI Intellectual Prop. Course, Handbook Series No. G-625, 2001), available at WL 652 PLI/Pat 437; see also Dan Streeter, Comment, *Into Contract's Undiscovered Country: A Defense of Browse-wrap Licenses*, 39 SAN DIEGO L. REV. 1363, 1367 (2002).

75. Courts have interpreted U.C.C. § 2-204(1) to mean that licensors can dictate how assent to the contract must be given. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996). U.C.C. § 2-207 does place some limits on mass market licenses. It eliminates the "battle of the forms" by setting a default rule that binds parties only to terms that were agreed upon when the contract was initially formed, and requires express assent to additional terms. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 99 (3d Cir. 1991).

76. See, e.g., CAL. COM. CODE § 2204(1) (2002) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 28-29 (2d Cir. 2002) (citing *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 991 (1972) "[C]onsent to, or acceptance of, the arbitration provision [is] necessary to create an agreement to arbitrate."); *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 848 (1999). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981) ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.").

77. See CAL. CIV. CODE § 1586 (1982) ("A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.").

78. "[U.C.C. s]ection 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*, 86 F.3d at 1452; see also CAL. CIV. CODE § 1589 ("A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."); *Id.* § 3521 ("He who takes the benefit must bear the burden."); *Cedars Sinai Med. Ctr. v. Mid-West Nat'l Life Ins. Co.*, 118 F. Supp. 2d 1002, 1008 (C.D. Cal. 2000) (holding that parties did not form a contract through a phone conversation because the conversation did not show assent).

79. 86 F.3d 1447 (7th Cir. 1996).

turer could bind purchasers by (1) providing notice of a license to a consumer at the point of sale, and (2) detailing the license terms and conditions post-sale while allowing the consumer to return the product if she refused to assent.⁸⁰ Other cases have upheld shrinkwrap licenses along similar reasoning.⁸¹ Only when licensors have failed to show that licensees knew of and gave assent to the license terms have courts invalidated shrinkwrap licenses.⁸² Courts have upheld online clickwrap licenses by analogy to shrinkwrap licenses.⁸³ Courts generally uphold clickwrap licenses because the user has an opportunity to review the terms and affirmatively assent prior to being bound by them.⁸⁴

80. *Id.* at 1451.

81. *See, e.g.,* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (upholding an arbitration agreement in a standard form agreement packed inside the box of a new computer); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (upholding licensor's standard Shareware Registration Agreement where defendant had agreed to it prior to placing his software on licensor's system); *see also* Bowers v. Baystate Techs., Inc., 320 F.3d 1317 (Fed. Cir. 2003) (enforcing a shrinkwrap license agreement that prohibited reverse engineering); Lozano v. AT&T Wireless, 216 F. Supp. 2d 1071 (C.D. Cal. 2002) (holding that an arbitration agreement contained in the "Welcome Guide" provided with the cellular telephone was binding even though the terms and conditions were provided after the initial transaction).

82. *See, e.g.,* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991) (refusing to enforce disclaimer of warranty and limitation of liability provisions contained in a shrinkwrap agreement of a vendor where an Internet company sought contribution for problems suffered by its customers); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988) (upholding a district court finding that a shrinkwrap license which prohibited reverse engineering was a contract of adhesion and therefore unenforceable); Softman Prods. Co. L.L.C. v. Adobe Sys. Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001) (holding a clickwrap license unenforceable because there was no evidence that defendant had ever read or assented to the End User License Agreement); Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000) (holding an arbitration agreement contained in a shrinkwrap license invalid because licensor could not prove that it informed the customer of the conditions before the sale); Licitra v. Gateway, Inc., 734 N.Y.S.2d 389 (N.Y. Ct. Cl. 2001) (declining to enforce the terms on a form included in a computer box because there was no evidence that the consumer had agreed to the terms).

83. Clicking on a webpage's clickwrap button after receiving the license terms is much like breaking the shrinkwrap seal and using the software after receiving the license terms. *See* sources cited *supra* notes 81-82.

84. *See, e.g.,* *In re* RealNetworks, Inc., Privacy Litig., No. 00-C-1366, 2000 WL 631341 (N.D. Ill. May 8, 2001) (holding that web users had agreed to an arbitration agreement in a clickwrap license); Hotmail Corp. v. Van\$ Money Pie, Inc., 47 U.S.P.Q.2d (BNA) 1020, 1025 (N.D. Cal. 1998) (upholding the validity of restrictions on the use of free e-mail accounts for sending advertisements).

Although many commentators have argued that the assent required by clickwrap and shrinkwrap licenses is inadequate for contract formation,⁸⁵ the U.C.C. and case law generally support the validity of these contracts. The Uniform Computer Information Transactions Act (UCITA), formerly article 2B of the U.C.C., agrees with this conclusion by specifically validating shrinkwrap and clickwrap agreements.⁸⁶ Broadly construed, UCITA arguably provides for contract formation surrounding all online information exchanges.⁸⁷

B. Validity of Browsewrap Licenses

In comparison to clickwrap licenses, courts have less clearly supported the enforceability of browsewrap licenses because these licenses do not require the consumer to view the license's terms or manifest assent.⁸⁸ But so far, courts have held browsewrap agreements enforceable if the website provides sufficient notice of the license.⁸⁹ This trend reinforces the UCITA's interpretation of contract formation, which concentrates on notice.⁹⁰ Although only a few courts have examined the validity of browsewrap licenses, they have found sufficient notice where it is (1) on the home page,⁹¹ (2) visible without scrolling to the bottom of the page,⁹² and

85. See Raymond T. Nimmer, *International Information Transactions: An Essay on Law in an Information Society*, 26 BROOK. J. INT'L L. 5, 44-45 (2000); Zachary M. Harrison, Note, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907, 937-38 (1998).

86. See generally Brian D. McDonald, Note, *The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461 (2001) (surveying the history and implications of UCITA). UCITA does not provide safeguards to protect public interests from overreaching in areas such as reverse engineering, public domain access, and fair use. See Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1360 (2003); James S. Heller, *UCITA: Still Crazy After All These Years, and Still Not Ready for Prime Time*, 8 RICH. J.L. & TECH. 5, 55-56 (2001), at <http://www.law.richmond.edu/jolt/v8i1/article5.html>; Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1626-27 (2002); see also O'Rourke, *Common Law*, *supra* note 69, at 295.

87. The UCITA applies to computer information transactions, including transactions of any information processed in or received from a computer. See McDonald, *supra* note 86.

88. *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

89. *Id.* at 982; *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 247-48 (S.D.N.Y. 2000). This analysis follows the reasoning of the U.S. Supreme Court in *Carnival Cruise* which upheld the validity of forum-selection clauses in adhesion contracts, so long as the clause was reasonable and the licensee had notice. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

90. See discussion *supra* notes 85-87.

91. *Pollstar*, 170 F. Supp. 2d at 982; *Register.com*, 126 F. Supp. 2d at 247.

(3) it looks like a hyperlink (i.e., if the text of the notice is underlined or in color).⁹³

The Second Circuit, in *Specht v. Netscape Communications*, affirmed a district court decision invalidating a license that failed both to provide adequate notice to users and to require users to express assent to the license.⁹⁴ Here, the licensor, Netscape, had only placed notice of a license at the bottom of their home page. Netscape argued that consumers had manifested assent to the license terms by downloading free software.⁹⁵ The Second Circuit disagreed:

A consumer's [conduct] does not communicate assent to contractual terms if the offer did not make clear to the consumer that [the conduct] would signify assent to those terms.⁹⁶ California's common law is clear that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious."⁹⁷

The *Specht* court affirmed that an offeree must be aware of a contract before they can assent by conduct, thus setting forth an adequate notice requirement.

A few recent cases demonstrate a trend toward enforcing browsewrap licenses as long as websites provide proper notice of the license. In *Pollstar v. Gigmania*, the website provider placed a notice on its home page that users would be bound by a license agreement reachable through a hyperlink if they continued onto the site.⁹⁸ The district court stated that many visitors to the site may not have seen the notice.⁹⁹ However, analogizing to *ProCD*, the court held that the license claim survived dismissal and could be valid because "people sometimes enter into a contract by using a service without first seeing the terms."¹⁰⁰ Similarly in *Register.com v. Verio*, a website provider used a browsewrap license to impose terms and condi-

92. *Pollstar*, 170 F. Supp. 2d at 982; *Register.com*, 126 F. Supp. 2d at 247.

93. *Pollstar*, 170 F. Supp. 2d at 981.

94. *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 25 (2d Cir. 2002).

95. *Id.* at 30 (arguing alleged licensees were on inquiry notice).

96. *Id.* at 29 (citing *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992 (1972), which stated that "when the offeree does not know that a proposal has been made to him this objective standard does not apply").

97. *Id.* (quoting *Windsor Mills*, 25 Cal. App. 3d at 992); see also *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049 (2001).

98. 170 F. Supp. 2d at 974.

99. *Id.* at 981; see also *supra* note 89 and accompanying text.

100. *Pollstar*, 170 F. Supp. 2d at 982.

tions on the use of data from its site.¹⁰¹ The district court held that the web user assented to the agreement by conduct because he did not argue that he was unaware of the terms and because he performed the conduct that the license specified as indicating assent.¹⁰² The *Ticketmaster* court followed the same logic.¹⁰³ The court upheld the validity of the browsewrap license on summary judgment, based solely on evidence that TX knew of the license.¹⁰⁴

III. DISCUSSION

This Note explains the differences between traditional shrinkwrap licenses and browsewrap licenses that may help clarify online contract jurisprudence. In doing so, it proposes a reassessment of the current status of browsewrap licenses and a return to the established contract requirements of clear offer and acceptance. Section A of this Part examines the procedural differences between formation of shrinkwrap and browsewrap licenses, focusing on the concepts of offer and acceptance in the context of Internet exchanges. It suggests that browsewrap licenses are per se invalid and that website providers should be held to greater procedural requirements so that licensees consciously assent to online licenses. Section B explores the nature of the entitlement that website providers obtain with these licenses. It suggests that greater procedural requirements for online contract formation would improve the balance between the interests of website providers and web users. Finally, Section C applies these contract formation requirements to the browsewrap license in *Ticketmaster*.

A. The Differences Between Shrinkwrap and Browsewrap Licenses Warrant a Separate Analysis of Browsewrap Licenses

Both shrinkwrap and browsewrap licenses purport to bind licensees by basing contract formation upon the licensees' conduct. However, unlike shrinkwrap licenses which govern software purchases, browsewrap licenses control a broad variety of exchanges, including the exchange of information between users and publicly available websites. Based on this difference, this Section suggests that notice of a browsewrap license is not sufficient to bind web users for two reasons. First, browsewrap licenses fail to sufficiently define the licensor's entitlement in its website because a

101. *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 242-43 (S.D.N.Y. 2000) ("By submitting this query, you agree to abide by these terms.").

102. *Id.* at 248.

103. *Ticketmaster II*, No. CV997654HLHVBKX, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003).

104. *Id.*

website without barriers to entry lacks the private character that other information products possess. Second, browsewrap licenses do not require adequate assent—where a user is not required to make a purchase or to respond materially to a formal offer, that user is less likely to recognize that she is binding herself to a license. In order to form a contract online, the website provider should set forth an offer page, which clearly delineates the private part of its website and that requires the licensee to manifest assent.

1. *Online Licenses Should Require a Clear Offer by Licensors to Delineate the Private Spaces on Their Websites*

While shrinkwrap licenses contain the offer and acceptance required for contract formation, browsewrap licenses on websites arguably do not. In upholding the shrinkwrap license in *ProCD*, the court reasoned that the software provider was an offeror because “placing the package of software on the shelf is an ‘offer,’ which the customer ‘accepts’ by paying the asking price and leaving the store with the goods.”¹⁰⁵ The court also explained that it was acceptable to base contract formation on notice because the customer could reject the contract terms by returning the product.¹⁰⁶ Similarly, when other courts have held notice sufficient to form a contract, they did so in the context of information product exchanges.¹⁰⁷ Website licensors attempt to form contracts based on users’ conduct of viewing their websites, which contain no barriers to entry. However, when a site freely displays facts to the general public, a user should not be bound simply by navigating through a site¹⁰⁸—such behavior does not indicate the user is willing to assent to a contract unless the website provider explicitly offers the contract before the user can perform assenting conduct. A user’s

105. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996). In addition, this is the same type of exchange that legitimized the forum-selection clause in *Carnival Cruise*. See *supra* note 89 and accompanying text.

106. *Id.* at 1452.

107. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997); see also *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002) (stating that notice would have supported contract formation had it been adequate).

108. See *Cybersell Inc. v. Cybersell Inc.*, 130 F.3d 414, 417 (9th Cir. 1997); *Info. Handling Serv. Inc. v. LRP Publ’ns Inc.*, No. Civ. A 00-1859, 2000 WL 433998, at *2 (E.D. Pa. Apr. 18, 2000) (“[I]t is questionable whether such licenses, which are not the product of any bargaining, should be permitted effectively to expand copyright protection to information that is not copyrightable in the first instance.”); see also *Schaefer v. Williams*, 15 Cal. App. 4th 1243, 1247 (1993) (“A bargain, the sole consideration of which is refraining or promising to refrain from committing a crime or tort, or from deceiving or wrongfully injuring the promisee or a third person, is illegal.”) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 578 (1932)).

behavior on websites is like that of a potential customer viewing a billboard or a brochure, which is an unrestricted and noncontractual exchange of information.¹⁰⁹ As well, website users lack the ability to prevent contract formation after they have performed the binding conduct, as customers are able to with shrinkwrap licenses by returning the product. Given the public nature of websites as opposed to the private nature of information products, contract formation in the context of public websites deserves a separate analysis from that in the shrinkwrap license context.

Courts should draw a line between public information and private information. They should distinguish between websites that provide information *as* a service and those that provide information *about* a service, allowing contract formation only when information is provided *as* a service. In order to bind users, website owners who provide information *as* a service should be required to make a clear offer, which users must accept to gain further access to their sites. Further, courts should not let website providers label as “proprietary” information which they have already placed in the public domain. For an online license to be valid, courts should require website providers to erect barriers to entry, effectively making the information private.¹¹⁰

Where a website provider wants to form a contract with its users but does not have other barriers to entry on its site (e.g., requiring users to register), courts should require the website to provide an offer page, where the user expresses assent to the license before continuing into the site. This Note advises courts to consider five factors in determining whether the website provider has made an explicit offer. First, the website should restrict access such that a user must encounter the offer page before reaching the private space on the site. The website could achieve this either by technologically restricting access so that users can only enter through the home page or by programming the offer page to appear whenever a user attempts access from outside the site. Second, the offer should use clear terminology. It should state that it is a contractual offer and require the user to click on an icon which says, for example, “I Accept.” Third, the offer should present the terms and conditions of use, so that a user can view them without clicking through additional links, either by having

109. Another useful analogy compares public and private spaces on the Internet to public and private city parks. A defining characteristic of private city parks is restricted access—they are usually fenced in and require a key for entry.

110. “In many ways, licenses serve not only to document legal terms governing the transaction, but actually define the very ‘product’ that is the subject of the transaction. They are thus central to the commercialization of software, information and other digital commodities.” Streeter, *supra* note 74, at 1368 (internal citations omitted).

them all on the offer page or by having them in a window through which licensees can scroll.¹¹¹ Fourth, the offer should be dominant on the home page, taking up a large percentage of the page (e.g., greater than fifty percent) so that users have to focus on it. Fifth, the offer page should not use default settings in favor of assent. Rather, the page should require that the user to indicate assent by clicking the mouse, or tabbing, and selecting the option of assenting.

2. *Online Licenses Should Require Express Assent by Licensees to Maintain Traditional Requirements of Contract Formation*

Online licenses should require clear assent by users to ensure that they know they are being bound. As noted above, a clear manifestation of assent, whether by writing, spoken word, or conduct, is the touchstone of a valid contract.¹¹² With most shrinkwrap licenses, users exchange money for the software product at the point of sale and then assent to the agreement by using the product. With clickwrap and some shrinkwrap licenses, users affirmatively indicate assent by clicking on an icon. Assent in these cases is unambiguous because users cannot proceed as if they were bound without first undergoing a substantive exchange. With browsewrap licenses, however, it is not clear that users have assented or are even aware of the license's existence. For this reason, presumably, courts and commentators have expressed a preference for a licensing arrangement in which users affirmatively assent.¹¹³ Therefore, courts should require website providers to state their sites' terms of use in the form of an offer, which users must accept to continue onto the protected part of the site.

111. Having terms and conditions on the offer page would arguably cure the problem of users not being able to refuse the license by returning the product because they will receive the terms and conditions, rather than notice, before assenting to them.

112. See sources cited *supra* note 76.

113. See *Ticketmaster II*, No. CV997654HLHVBKX, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003) (stating the court's preference for a rule which required users to affirmatively assent to the license); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000) (same); see also Melissa Robertson Note & Comment, *Is Assent Still a Prerequisite for Contract Formation in Today's E-economy?*, 78 WASH. L. REV. 265, 267-68 (2003) ("[C]ourts should enforce online contracts only where users have adequate notice of the terms and conditions and affirmatively agree to be bound by such terms."). Even in the case of shrinkwrap licenses, some commentators state that assent by conduct is inadequate. Professor Lemley has noted that "even the fiction of agreement is stretched to the vanishing point" in such standard form contracts. Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 125-26 (2000) [hereinafter Lemley, *Beyond Preemption*].

B. Requiring a Meaningful Exchange to Form Website Licenses Would Help Ensure an Appropriate Balance Between Public and Private Interests

As the Internet grows as a vehicle for commerce and communication, information providers are increasingly in the position to set the terms and conditions of the public's access to digital content.¹¹⁴ This Section discusses the way in which licenses affect the scope of the entitlement that information providers have in their websites. Many website providers offer valuable services that warrant contract protection. At the same time, however, they should be required to follow the traditional requirements of contract formation. Otherwise, website providers will have a vehicle by which they may place restraints on unknowing users of information that is arguably in the public domain. If users are only bound at the point of a substantive exchange, it will increase the likelihood that they understand that they are forming a contract. Because requiring a meaningful exchange may cause users to more carefully read online licenses and possibly refuse assent, website providers are likely to use these licenses more prudently and set terms more amenable to public interests.

Many website providers offer services that benefit the public, and when users value these services enough to assent to an explicit offer, the law should allow providers to bind users without encountering excessive regulations.¹¹⁵ Providers may wish to attach a variety of constraints to user activity, which will differ in how much they restrict user activity. While an offer page that presents a barrier to entry may deter some users, it will also increase user awareness of both the contract's existence and its substance. It follows that users are likely to assent to terms that do not unreasonably restrict user activity. Examples of less restrictive terms include liability

114. See James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109 (2003); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 878 (1999).

115. For example, database providers use contracts to protect their products and services. As Judge Posner recently noted in *Assessment Technologies*, which rejected copyright protection of a database, "the creation of massive electronic databases can be extremely costly, . . . yet if the database is readily searchable and the data themselves are not copyrightable the creator may find it difficult or even impossible to recoup the expense of creating the database." *Assessment Techs. of WI, LLC v. WireData, Inc.*, 350 F.3d 640, 645-46 (7th Cir. 2003). He suggested that licenses may fill the gap that intellectual property law fails to cover. *Id.* at 646 ("The existence of contractual solutions to the problem of copying the contents of databases is one of the reasons that Professor Ginsberg and others are skeptical about the need for legislative protection of databases."); see also Garon, *supra* note 86, at 1360.

waivers to keep users from detrimentally relying on website information and disclaimers by chat room hosts that the website provider is not responsible for comments made by third party users.¹¹⁶ Other examples include forum selection or arbitration clauses that somewhat restrict users' litigation rights but do not limit their use of website information.¹¹⁷ Slightly more restrictive terms may limit information use to noncommercial uses or limit linking to the site. The most restrictive terms may limit beneficial information uses by preventing activities that qualify as copyright fair uses like critical commentary, reverse engineering, or parody.¹¹⁸ Users may find the most restrictive terms unreasonable and refuse to accept them.

Protections against overly restrictive terms are available both within and without contract law. Commentators suggest that mass market contracts will erode the public domain,¹¹⁹ even if they are formed in a way

116. It is possible that website providers may make disclaimers such as this by providing notice, but without being required to form a contract. *See generally* Allison S. Brantley et al., *The Legal Web of Wireless Transactions*, 29 RUTGERS COMPUTER & TECH. L.J. 53, 76 (2003) (discussing typical terms and conditions governing a wireless transaction, such as "rules for purchasing the product or service, warranty disclaimers, indemnity provisions, limitations of liability clauses, and forum selection clauses").

117. *See id.*

118. Many commentators warn that courts' "regular validation" of mass market standard form contracts online "would tend to change standard form licenses of digitized information goods into functional equivalents of privately legislated intellectual property rights." Reichman & Franklin, *supra* note 114, at 878. For an explanation of how contracts have begun to operate uniformly against the "world" see O'Rourke, *Common Law*, *supra* note 69, at 295.

119. Firms possessing any degree of market power could thereby control access to, and use of, digitized information by means of adhesion contracts that alter or ignore the balance between incentives to create and free competition that the Framers recognized in the Constitution and that Congress has progressively codified in statutory intellectual property laws.

Reichman & Franklin, *supra* note 114, at 878; *see* Lemley, *Beyond Preemption*, *supra* note 113, at 130 (explaining that this is what happened in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), in which the plaintiffs were allowed to protect by shrinkwrap license the very material that the Supreme Court had said could not be protected by copyright). However, at least in *ProCD* there was an actual sale on which to base the contract! 86 F.3d at 1450. For additional commentary discussing public interests in information and the implication of propertizing information by contract, *see* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1048-72 (1997); Lemley, *Shrinkwrap Licenses*, *supra* note 70; Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135 (2004); *see also* Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of Rights Management*, 97 MICH. L. REV. 462 (1998); Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 106-13 (1997); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 25-30 (1996). *But see*

that makes users aware of being bound.¹²⁰ However, under the UCITA model of contract law, a person who makes reasonable uses of information in violation of a license can argue that “the license term interferes with federal intellectual property policy and should be preempted, is a misuse of intellectual property rights, is a fair breach of the license, or is unconscionable.”¹²¹ The public may also push Congress or the state legislatures to pass laws which list certain information use restrictions as per se unreasonable or unconscionable.

Requiring a meaningful exchange will enable the market to more accurately protect public interests in online information. When website providers are able to automatically and unilaterally bind users, it creates a market failure because the public loses not only the ability to bargain but also the knowledge that it is entering into an agreement at all. Rather, providers should make substantive economic decisions on whether to require express assent from their users with substantive barriers to entry, effectively making their websites private property. Website providers who offer information as a service (e.g., databases) would presumably be willing to put up an offer page to protect their products. Some website providers, however, may decide not to bind users immediately,¹²² but rather may place the offer page deeper in their sites—to govern access to a more select set of information. Regardless of website providers’ choices as to whether and where to erect offer pages, they will still receive protection for their intellectual property and computer networks under copyright and trademark law, the Computer Fraud and Abuse Act, and common law doctrines such

Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 592 (1998); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 228 (1996); Charles R. McManis, *The Privatization (or “Shrink-Wrapping”) of American Copyright Law*, 87 CALIF. L. REV. 173 (1999).

120. See Cohen, *supra* note 119, at 466 (“[I]n light of the special nature of creative and informational works and of creative and intellectual progress, there is substantial reason to believe that a limited-ownership regime is better suited to furthering th[e] goals of access and progress.”).

121. See Pamela Samuelson, *Mapping the Public Domain: Threats and Opportunities*, LAW & CONTEMP. PROBS. 147, 163-64 (2003). The UCITA limits the enforcement of mass market licenses in three ways: (1) by requiring assent to the terms, (2) by excluding terms that are unconscionable or against public policy, and (3) by excluding terms that conflict with other agreed upon terms. See Streeter, *supra* note 74, at 1376.

122. One reason for setting the offer page deeper in the site would be to allow access to spiders from search engines. See Elkin-Koren, *supra* note 10, at 185 (“Search engines [] turn out to be one of the most significant players in the information economy.”).

as trespass to chattels.¹²³ In situations where information providers cannot form valid contracts and other laws do not cover them, they should either dedicate the material to the public domain or they should lobby Congress for legislation which does cover them.¹²⁴

Given the open and fluid nature of the Internet,¹²⁵ the idea of requiring website providers to erect barriers to entry seems perverse. At first glance, browsewrap licenses present the best solution because they allow website providers protection while maintaining the web's fluidity. This Note contends, however, that browsewrap licenses actually decrease the web's openness by restricting web users' behavior. Because these licenses defy the traditional model of contracts, they present a danger to the public domain. By requiring a meaningful exchange for online contract formation, the law will ensure that the market functions properly. As a result, the law will prioritize maintaining some public spaces on the Internet, where users are free from contract—particularly contract that automatically binds them.

C. The Court Should Hold Ticketmaster's Browsewrap License Invalid and Unenforceable for Lack of Licensee Assent

In *Ticketmaster*, TM argued that TX agreed to be bound by TM's browsewrap license by using TM's site after receiving notice of TM's terms of use. However, TM failed to prove that it met the minimum requirements of contract formation by making a clear offer to TM in the first place. Further, TM failed to prove that TX assented to the license. Indeed, even in an economy that accepts mass market standard form contracts,¹²⁶ browsewrap licenses stretch the concept of mutual agreement too far by not requiring licensees to assent. Overall, a holding that TM's browsewrap license is valid and enforceable would have broad implications, given that it potentially binds millions of Internet users who visit the TM website annually. Thus, the court should maintain the traditional requirements of

123. See, e.g., *Intel v. Hamidi*, 30 Cal. 4th 1342 (2003) (discussing trespass to chattels on a computer network); Christopher R. Hilberg, *Trademarks and Hyperlinks: A Policy Analysis, Part II*, 19 No. 7 COMPUTER & INTERNET LAW 12 (describing a legal rule that interprets trademark and trade identity law to protect against any web activity that causes potential loss of Internet advertising revenues).

124. Although none have succeeded, there have been legislative efforts to provide legal protection for databases. Jane Ginsberg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151 (1997) (describing that Europe has already provided protection to database creators).

125. See Tim Berners-Lee, *Axioms of Web Architecture, Links and Laws—Myths*, at <http://www.w3.org/DesignIssues/LinkMyths.html> (last visited Feb. 17, 2003).

126. See *supra* notes 75-78 and accompanying text.

contract law by invalidating TM's license due to a lack of clear offer and acceptance.

TM's browserwrap license should not be enforceable because it did not make a clear offer nor did it require TX to manifest assent. TM was not in the position of "offeror." Its website was publicly accessible without technological barriers to entry, and provided information that users could find elsewhere for free. TM was not in the business of providing event-related information; it sold tickets. The event information was a public advertisement, not a good in itself. When TM makes factual event information available to the general public, it has dedicated that information to the public domain unless it has erected a barrier to viewing. Conversely, when TM sells an event ticket, it readily attaches licenses to those exchanges by requiring users to provide personal and payment information, which clearly signals the buyer's assent. Only when information providers and users engage in a meaningful exchange by making a clear offer and acceptance, should it warrant contract formation.

The district court found that TX had notice of the license, which supported contract formation.¹²⁷ However, TX claims that it rejected the contract terms implicitly, and later explicitly, even though it continued onto the site.¹²⁸ Licensors cannot impose a contract unilaterally on a party that rejects the contract terms.¹²⁹ More importantly, this Note argues that mere notice of a license is insufficient to support contract formation. Courts should refuse to validate licenses that fail to fulfill minimum procedural requirements to bind licensees. Website providers such as TM should need to erect a barrier to entry to contractually bind their users.

Website providers can be expected to make economic decisions regarding whether they privatize their sites or keep them open to the public. In *Ticketmaster*, the website provider, as the largest ticket sales outfit in the world dominated the U.S. ticket market by negotiating exclusive distribution agreements with numerous venues.¹³⁰ By having its site open to the public, it benefited by advertising and selling tickets to casual users. As well, if it were to control access to its site, TM would not necessarily

127. *Ticketmaster II*, No. CV997654HLHVBKX, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003).

128. Appellee Tickets.com, Inc.'s Brief, *supra* note 2, at *36.

129. *Sorg v. Fred Weisz & Assocs.*, 14 Cal. App. 3d 78, 81 (1970) (reversing plaintiff's contract claim where plaintiff had made a unilateral statement that defendant's use of plaintiff's property would form a contract and defendant had continued use, because plaintiffs had only "attempted to construct a bilateral agreement by the fictional grant of a license" and this tactic "has been consistently rejected by the courts").

130. See source cited *supra* note 2.

gain significant benefits—TM was unable to prove that it suffered any damages to its business or its computer network due to the alleged breach of contract.¹³¹ Thus, given the choice, TM may have decided to forego contract protection against all visitors. It may have determined that the costs in lost user traffic of erecting a barrier to entry in the form of an offer page outweighed the benefits of contract protection. Indeed, it may have decided to wait until users purchased tickets to bind them.

IV. CONCLUSION

TM's browsewrap license is a classic example of a mass market standard form contract on the Internet, which strays too far from the form of traditional contracts to be enforceable. It neither provides a legitimate offer, nor does it require clear acceptance. In determining the validity of an online contract, courts should distinguish between commercial, publicly available websites and those that have restricted access. Courts should only allow website providers to form contracts with their web users when they restrict access to their sites. Only when information providers and users engage in a meaningful exchange by rendering a clear offer and acceptance, should it warrant contract formation.

131. *Ticketmaster II*, 2003 WL 21406289, at *3. In fact TX's deep linking may have benefited TM by encouraging TX users to purchase tickets from TM. As for TX's spidering, both parties disputed how much of TM's computer capacity the TX spiders took up. However, TM presented no evidence that the spidering harmed its computer system or hindered its ability to serve customers. Finally, the district court noted that although TX made a commercial use of the information it obtained on TM's site, TM did not show that this caused any loss of traffic or advertising sales. In fact, during the time of the alleged breach, TM's space for advertising was saturated and it had to turn away potential clients. Appellant's Opening Brief, *supra* note 2, at *10.