

Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses*

TABLE OF CONTENTS

| | | |
|-------|--|------|
| I. | INTRODUCTION | 1364 |
| II. | MASS MARKET LICENSE AGREEMENTS | 1367 |
| III. | CURRENT TRENDS IN THE LAW OF LICENSES | 1370 |
| | A. <i>Cases Limiting Mass Market Licenses</i> | 1370 |
| | B. <i>Cases Validating Mass Market Licenses</i> | 1372 |
| | 1. <i>Shrink-Wrap Agreements</i> | 1372 |
| | 2. <i>Click-Wrap Agreements</i> | 1373 |
| IV. | THE UCITA ON LICENSES..... | 1373 |
| | A. <i>General Background of the UCITA</i> | 1373 |
| | B. <i>Specific Provisions of the UCITA</i> | 1374 |
| | 1. <i>UCITA Section 112: Manifesting Assent;</i> <i>Opportunity to Review</i> | 1374 |
| | 2. <i>UCITA Section 208: Adopting Terms of Records</i> | 1375 |
| | 3. <i>UCITA Section 209: Mass Market Licenses</i> | 1376 |
| V. | IMPORTANT ISSUES IN MASS MARKET LICENSING | 1376 |
| | A. <i>The Unfairness of Mass Market Licenses</i> | 1377 |
| | B. <i>Mass Market Licenses as Adhesion Contracts</i> | 1380 |
| | C. <i>Assent</i> | 1381 |
| | D. <i>Freedom of Contract Versus Regulation</i> | 1383 |
| VI. | THE ENFORCEABILITY OF BROWSE-WRAP LICENSES | 1384 |
| | A. <i>Criticism of Browse-Wrap</i> | 1384 |
| | B. <i>A Defense of Browse-Wrap</i> | 1386 |
| VII. | A SUGGESTION TO COURTS AND LEGISLATURES..... | 1391 |
| VIII. | CONCLUSION | 1392 |

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I. INTRODUCTION

The Internet has grown to a level of global importance almost overnight.¹ By now, the statistics are common knowledge but staggering nonetheless. The Internet swelled from a state of general anonymity in 1990 to a projected 320 million users in 2002.² In accordance with this monumental growth, the Internet has been groundbreaking for commerce. By 1998, twenty percent of U.S. households had made a purchase online.³

The Internet is important not only because of its popularity, but also because of its power for innovation.⁴ The Internet has caused an explosion of new services and innovative types of commerce.⁵ The Internet has also changed the contours of the marketplace, creating a connected economy in which anyone with a computer and a phone line can do business directly with a maker of goods anywhere in the world and at any time.⁶ The Internet has even changed consumers themselves, empowering them with unlimited information about products.⁷ The Internet has also changed the relationship that consumers have with products created and distributed by digital technology, such as computer programs. In a transaction dealing with digital information, consumers purchase *access* to information products rather than the products themselves.⁸ This access is purchased in the form of a license.⁹

1. See FRANCES CAIRNCROSS, *THE DEATH OF DISTANCE* 87 (1997) (noting that the Internet went from a state of general anonymity in 1990 to an estimated 57 million users in 1997).

2. KEITH BROWN, *THE INTERACTIVE MARKETPLACE* 32 fig.1-3 (2001). Almost half of the households in the U.S. have Internet connections. See *id.* at 29 fig.1-2.

3. *Id.* Forrester Research, a market research firm, estimated that by 2003, business sales online will reach \$1.3 trillion, or 9.4% of total business sales. JEREMY RIFKIN, *THE AGE OF ACCESS* 18 (2000).

4. See CAIRNCROSS, *supra* note 1, at 87.

5. See *id.* The Internet has been especially important for intangible products, such as airline tickets, stocks, music, news, and insurance policies. See WENDY CURRIE, *THE GLOBAL INFORMATION SOCIETY* 120 (2000). These items, which are in essence just information, can now be bought, sold, and transferred over the Internet. See *id.* This digital delivery is bound to permanently change commerce. See *id.*

6. See RIFKIN, *supra* note 3, at 18-19; CAIRNCROSS, *supra* note 1, at 125-26.

7. BROWN, *supra* note 2, at 62-64 (noting that with the vast amount of information made available by the Internet, consumers will know all the aspects of a purchase, creating a "transparent" marketplace where no information is privileged).

8. Andrew R. Basile & Alex P. Paul, *Mass Market License Agreements*, in *PATENT & HIGH TECHNOLOGY LICENSING* 407, 409 (PLI Intellectual Prop. Course, Handbook Series No. G-652, 2001), available at WL 652 PLI/Pat 407; see *infra* notes 29-40 and accompanying text.

The growth of the Internet has all of the signs of a revolution, with some people looking forward to the possibilities of the digital future and others yearning for the relative certainty of the brick and mortar past.¹⁰ In light of this new technology, a basic question has arisen about how law should apply to economic activity taking place in the digital realm.¹¹

This Comment highlights one corner of that discussion—contractual assent on the Internet. In its broadest sense, contractual assent on the Internet refers to any agreement that is made using the digital communication enabled by the Internet.¹² The Internet has made it very easy for people to enter into contracts. Many of these contracts are licenses. This Comment explores the enforceability of so-called browse-wrap agreements as a means of creating licenses on the Internet.

Browse-wrap refers to a mass market license agreement¹³ that is formed on a Web site.¹⁴ The key feature of browse-wrap, and the source of its legal uncertainty, is that it does not force a potential licensee to undertake an act that explicitly expresses an intent to enter into the license, such as clicking “I agree.”¹⁵ A browse-wrap license is sometimes displayed directly on a Web site’s initial page or on a link within the site.¹⁶ Users are asked to read the agreement and assent before using the information that is the topic of the license.

Browse-wrap licenses are typically used to create licenses for information products available on the Internet.¹⁷ Browse-wrap might

9. A license is defined as “leave to do a thing which the licensor would otherwise have a right to prevent.” *W. Elec. Co. v. Pacent Reproducer Corp.*, 42 F.2d 116, 118 (2d Cir. 1930). A license is a contract in which the buyer is given the permission to use the product, but is not given ownership of the product. See *infra* notes 29–40 and accompanying text.

10. See Raymond T. Nimmer, *International Information Transactions: An Essay on Law in an Information Society*, 26 *BROOK. J. INT’L L.* 5, 6 (2000).

11. *Id.*

12. For example, if a computer program is purchased from a Web site, some action during the sale, such as clicking an “I Agree” button or giving a credit card number, indicates assent by the buyer. This assent is given on the Internet.

13. A mass market licensing agreement is a form contract that details the terms of a licensing agreement. Because it is a form contract, the individual terms of the license cannot be bargained for. See *infra* notes 29–48 and accompanying text.

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

15. See *id.*

16. See *id.* The site in *Pollstar* had a notice on the home page that a license existed. The notice was also a link to the actual text of the license. See *id.*

17. An information product is a product that communicates an idea. It cannot be held or touched. It is intangible information. Computer software falls in this category. See Raymond T. Nimmer, *UCITA: A Commercial Contract Code*, *COMPUTER LAW.*, May

come in the form of a license limiting the liability of a Web site that gives out free software programming tips. Browse-wrap might also appear as a license regulating the use of free games offered on a Web site.

Several years ago, it seemed that browse-wrap would be enforced along with other types of digital assent.¹⁸ However, two recent cases have brought the fate of browse-wrap into question.

In *Ticketmaster Corp. v. Tickets.com, Inc.*, a California district court refused to enforce a browse-wrap license on Ticketmaster's Web site.¹⁹ The license prohibited users from using the site for commercial purposes and from "deep linking" to the site.²⁰ The browse-wrap agreement was displayed on the bottom of the site's main page, but the court reasoned that consumers were not given proper notice of the license.²¹

Similarly, in *Specht v. Netscape Communications Corp.*, a New York district court refused to enforce a browse-wrap license agreement that Netscape attached to its free software.²² The browse-wrap license was indicated by a link on the same page users visited to download the software and included a forum selection clause that would apply to anyone using the free software distributed by Netscape.²³ The court found that the users of the software did not assent to the license because the users did not have proper notice of its existence and consequently the users had done nothing to indicate assent.²⁴

2000, at 3, 5. The communicative aspect of computer software is problematic for policy makers because it brings up issues of freedom of speech and information policy. *See id.*

18. *See Pollstar*, 170 F. Supp. 2d at 982 (declining to declare browse-wrap invalid because of a recent ruling validating other licensing agreements); Dawn Davidson, Comment, *Click and Commit: What Terms Are Users Bound to When They Enter Web Sites?*, 26 WM. MITCHELL L. REV. 1171, 1186–87 (2000) (noting that the policies behind recent developments in the law of licensing bode well for licenses posted on Web sites, but also suggesting that these cases offer little insight into what sort of notice is required for a valid agreement).

19. *Ticketmaster Corp. v. Tickets.com, Inc.*, 54 USPQ 2d (BNA) 1344, 1346 (C.D. Cal. 2000).

20. *Id.* Deep linking is the practice of using a hyperlink to send a user to the interior of another site rather than the new site's front page. For example, users of the Tickets.com site were taken directly into Ticketmaster's site, not the front page of the site as Ticketmaster would have preferred. *Id.* at 1345–46.

21. *See id.* at 1346 ("Many customers instead are likely to proceed to the event page of interest rather than reading the 'small print.' It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with any one [sic] using the web site."). The idea that a contract's terms must be clearly represented to the agreeing parties is tied to the concept of procedural unconscionability, which holds that it is unfair to enforce contracts with terms that are couched in the fine print or otherwise unfairly concealed. *See infra* notes 120–24 and accompanying text.

22. *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d. 585, 595 (S.D.N.Y. 2001).

23. *See id.* at 595–96.

24. *Id.* at 595.

The *Ticketmaster* and *Specht* decisions highlight a distressing trend toward restricting the formation of contracts on the Internet, all in the name of consumer protection. This trend runs counter to the increasing validation of shrink-wrap licenses²⁵ and click-wrap licenses²⁶ as well as the policy goals of the Uniform Computer Information Transactions Act (UCITA), a uniform set of laws created explicitly for electronic transactions.²⁷ The trend is also dangerous to the rapid growth of digital technology. Any unnecessary restrictions on digital contracting could have negative effects on the development of future technologies.²⁸

This Comment analyzes the enforceability of browse-wrap licenses and argues that courts should uphold browse-wrap licenses. Part II lays out the fundamentals of mass market licensing agreements. Part III outlines the current state of the law concerning browse-wrap's predecessors: shrink-wrap and click-wrap agreements. Part IV discusses the UCITA view on mass market licenses by examining its general policies and some relevant provisions. Part V delves into the policy issues surrounding mass market agreements. Part VI offers a detailed analysis of browse-wrap and its benefits. Finally, Part VII recommends that courts carefully consider the benefits of browse-wrap agreements before ruling against them and advises legislatures to consider adopting some form of the UCITA.

II. MASS MARKET LICENSE AGREEMENTS

To understand the debate over browse-wrap licenses, it is important to understand mass market licenses generally. A license is generally defined as "leave to do a thing which the licensor would otherwise have a right to prevent."²⁹ A mass market license is a form contract that accompanies many information products, such as software, and outlines the ways the products can be used.³⁰ Mass market license agreements

25. See *infra* notes 70–85 and accompanying text.

26. See *infra* notes 86–91 and accompanying text.

27. For a discussion of the UCITA, see generally Brian D. McDonald, *The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461 (2001).

28. The future of digital technology is uncertain, and unnecessary regulation could have unforeseen effects on the progress of new technologies. One such technology, the automated "bot" that can be programmed to buy and sell items on its own over the Internet, is already being threatened by over regulation of Internet contracting. See *infra* notes 202–05 and accompanying text.

29. *W. Elec. Co. v. Pacent Reproducer Corp.*, 42 F.2d 116, 118 (2d Cir. 1930).

30. See Stephen T. Keohane, *Mass Market Licensing*, in PATENT & HIGH

arose out of the necessities of burgeoning digital technologies.³¹ In typical information license agreements, the licensor retains ownership of the information and grants permission for the use of the information.³² For example, in the sale of a computer program, the buyer does not get ownership of the program code, the buyer purchases the right to use the software.³³ 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.”³⁴ Licenses are also used in contexts outside of information products.³⁵

In order for licenses to be useful in a mass market, the agreements cannot be individually negotiated—they must be standardized.³⁶ These agreements allow sellers to offer consumers high-end products at relatively low prices.³⁷ The use of licenses also allows distributors of information to avoid the first sale doctrine that allows purchasers of copyrighted works to resell or give the work away.³⁸ Software vendors also use licenses to protect noncopyrighted information by limiting the

TECHNOLOGY LICENSING, *supra* note 8, at 437, 443, available at WL 652 PLI/Pat 437. Mass market licenses are not limited to software; they are also used for other items that require mass distribution, such as computers. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

31. See Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 338–41 (1996) (discussing the history of license agreements in the computer industry).

32. Basile & Paul, *supra* note 8, at 409.

33. *Id.*

34. *Id.*

35. Licenses are often used to outline warranties or other terms for tangible goods, such as computer hardware. See *Hill*, 105 F.3d at 1148 (involving a license covering a computer).

36. See Gomulkiewicz & Williamson, *supra* note 31, at 342. Standard forms allow distributors to sell products cheaply by lowering transactions costs that would come from negotiating the terms of every sale. If a software program costs \$100,000,000 to produce and 1,000,000 people want it, the seller only needs to sell it for \$100 to break even. This low cost can only be maintained if transaction costs are low. Mass market licenses facilitate low transaction costs by allowing for mass distribution without having to negotiate each sale. *Id.*

37. *Id.*

38. Scott J. Spooner, *The Validation of Shrink-Wrap and Click-Wrap Licenses by Virginia’s Uniform Computer Information Transactions Act*, 7 RICH. J.L. & TECH. 27, ¶ 6 (2001), at <http://law.richmond.edu/jolt/v7i3/article1.html>. The first sale doctrine means that under U.S. copyright law, the buyers of a copyrighted work have the right to transfer that copy in any way they see fit. See *id.* For example, the buyer of a book can resell the book to anyone for any price after the initial sale. Computer programs are copyrighted works. Since computer programs can be passed around and loaded onto an infinite number of computers, it is important to software makers to avoid the first sale doctrine. This is achieved by characterizing the transaction not as a sale, but as an issuance of a license to use the product. See *id.*

ways it can be used.³⁹ Finally, licenses allow sellers to practice price discrimination by charging different prices for different uses of the product.⁴⁰

The most common type of mass market licensing agreement is a predecessor to browse-wrap known as the shrink-wrap license.⁴¹ The simplest form of shrink-wrap licenses display the terms of the agreement on the package of the product, visible through a cellophane wrapper. The licensee assents to the agreement by simply opening the shrink-wrap.⁴² Some shrink-wrap licenses have a notice on the outside of the box indicating that a license exists and that the terms of the agreement are inside the product; these terms are impossible to review before purchase.⁴³ In this case, a potential licensee is asked to review the agreement after buying the product and to indicate assent in some way.⁴⁴ If the buyer does not agree to the terms, the product can be returned.⁴⁵

Another type of mass market license agreement used in the distribution of information technology is the click-wrap agreement. Click-wrap agreements get their name from the shrink-wrap agreements that preceded them.⁴⁶ Click-wrap agreements display the license on a computer screen and require the potential licensee to click or type “I agree” to show acceptance of the terms before the product can be used.⁴⁷ Thus far, courts have upheld these agreements.⁴⁸ Despite the fact that these different “wrap” style licenses have the same origin and serve the same purpose, they have received disparate treatment from courts. This is the focus of the next Part.

39. See Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1245–47 (1995). A license may prohibit a user from reselling the product, copying the product, or decompiling the product. *Id.* at 1266–68.

40. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (explaining that the maker of a phone database program charged different prices and used different licenses to target different segments of the market).

41. See Gomulkiewicz & Williamson, *supra* note 31, at 339–41.

42. See Spooner, *supra* note 38, at ¶ 4.

43. *Id.*

44. See Keohane, *supra* note 30, at 444–45.

45. See Gomulkiewicz & Williamson *supra* note 31, at 340.

46. See 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, 912 (1998).

47. Keohane, *supra* note 30, at 445.

48. See Nimmer, *supra* note 10, at 42.

III. CURRENT TRENDS IN THE LAW OF LICENSES

The cases concerning mass market licensing have done little to settle the issue of their enforceability. Thus far, decisions considering the issue of mass market licensing have hinged on competing applications of the Uniform Commercial Code (UCC).⁴⁹ The cases concerning these agreements “turn on whether the court finds that the parties formed their contract *before* or *after* the vendor communicated its terms to the purchaser.”⁵⁰ Courts that prohibit mass market licenses consider the contract to be formed at purchase, with the license constituting additional terms.⁵¹ Courts that enforce mass market licenses view the incorporation of the license as one step of a complex transaction.⁵²

A. Cases Limiting Mass Market Licenses

Courts that have refused to enforce mass market license agreements have done so under a UCC section 2-207, or “battle of the forms” analysis.⁵³ Section 2-207 of the UCC seeks to do away with the battle of the forms or “last shot rule” in which the last party to send out terms in a transaction gets to enforce those terms.⁵⁴ Section 2-207 accomplishes this by requiring express assent to any additional terms of a contract and providing a default rule that binds parties only to terms that have actually been agreed upon.⁵⁵

In *Step-Saver Data Systems, Inc. v. Wyse Technology*, the Third Circuit refused to enforce a shrink-wrap license.⁵⁶ Step-Saver had ordered software from its producer over the phone. The software was packaged with a shrink-wrap license that contained various warranty

49. Compare *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 100–06 (3d Cir. 1991), and *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1337 (D. Kan. 2000), and *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 762–66 (D. Ariz. 1993), with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997), and *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452–53 (7th Cir. 1996).

50. *Klocek*, 104 F. Supp. 2d at 1338.

51. See *Step-Saver*, 939 F.2d at 100–06; *Klocek*, 104 F. Supp. 2d at 1337; *Ariz. Retail Sys.*, 831 F. Supp. at 762–66.

52. See *Hill*, 105 F.3d at 1150; *ProCD*, 86 F.3d at 1452–53.

53. See *Step-Saver*, 939 F.2d at 100–06; *Klocek*, 104 F. Supp. 2d at 1340–41; *Ariz. Retail Sys.*, 831 F. Supp. at 766.

54. See *Step-Saver*, 939 F.2d at 99. The common law rule held that the offer and the acceptance must mirror each other. If the terms of the acceptance did not match the offer, the acceptance was considered a counteroffer. The practical effect of this rule was that the side to send out the last offer, or “last shot,” before performance began, dictated the terms of the deal because the final form sent out was considered the binding offer. *Id.*

55. *Id.*

56. *Id.* at 105.

provisions and a disclaimer of liability.⁵⁷ When the product proved defective, Step-Saver sued.⁵⁸ The software producer claimed that the license agreement barred the action.⁵⁹

The issue in the case was whether the agreement was completed over the phone or completed when the shrink-wrap was opened. The court, applying UCC section 2-207, held that the transaction was completed when the product was ordered over the phone and that the terms included in the shrink-wrap license were additional and were never assented to by Step-Saver.⁶⁰

The more recent case of *Klocek v. Gateway, Inc.* provides another example of how courts may use UCC section 2-207 to nullify a shrink-wrap license.⁶¹ Klocek purchased a computer from Gateway.⁶² The computer came with a shrink-wrap license that included a clause requiring arbitration of all disputes.⁶³ The license indicated that the customer's failure to return the goods within five days signaled assent to the license.⁶⁴ Klocek kept the items for more than five days but eventually sued for breach of warranty.⁶⁵ Gateway contended that the arbitration clause should be enforced.⁶⁶

The court, applying Kansas's codification of UCC section 2-207, held that the agreed upon terms did not include the shrink-wrap license.⁶⁷ The arbitration clause was found to be an additional term introduced by Gateway after completion of the sale, to which Klocek had not shown assent.⁶⁸ The court also found that Klocek's failure to return the goods was not sufficient to show an express agreement to the terms of the license.⁶⁹

57. *Id.* at 96–97.

58. *Id.* at 94.

59. *See id.* at 94–95.

60. *Id.* at 103.

61. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000).

62. *See id.* at 1334.

63. *See id.* at 1334–35.

64. *See id.* at 1335.

65. *See id.* at 1334.

66. *See id.*

67. *See id.* at 1341.

68. *Id.*

69. *Id.*

B. Cases Validating Mass Market Licenses

1. Shrink-Wrap Agreements

Courts that have enforced shrink-wrap licenses relied not on UCC section 2-207, but on UCC section 2-204(1).⁷⁰ Section 2-204(1) states that a contract can be formed in any manner that shows agreement.⁷¹ Courts upholding these licenses interpret section 2-204(1) to mean that sellers can dictate how assent to the contract must be given.⁷² Applied to shrink-wrap licenses, this means that the party offering the license can dictate how a potential licensee should indicate assent to the license.⁷³

A leading case validating mass market licenses is *ProCD, Inc. v. Zeidenberg*.⁷⁴ ProCD compiled and sold a computer database of phone directories.⁷⁵ ProCD marketed one version to businesses and another to the general public at a lower price.⁷⁶ The products were the same except that the general public version came with a shrink-wrap license that prohibited its use for commercial purposes.⁷⁷ The license was mentioned on the packaging and included in the user manual.⁷⁸ The license also appeared on the computer screen before the program could be used.⁷⁹ Zeidenberg bought a copy of the software and made it available on the Internet for a fee.⁸⁰ ProCD brought an action seeking an injunction against further violations of the license.⁸¹

The Seventh Circuit treated UCC section 2-207 as irrelevant because, in its view, a section 2-207 analysis requires at least two forms.⁸² This transaction had only one form—the license.⁸³ The court then applied UCC section 2-204(1), finding that ProCD, as the party making the offer, created a multi-layered transaction in which a consumer first buys the product, can then review the license at leisure, and finally assents to the contract by using the program.⁸⁴ The court found that Zeidenberg

70. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (relying on the logic of *ProCD* to defeat an argument based on section 2-207 of the UCC).

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

72. See *id.*

73. See *id.*

74. 86 F.3d 1447.

75. *Id.* at 1449.

76. *Id.*

77. *Id.* at 1450.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1452.

83. *Id.*

84. *Id.*

assented to the terms of the license by using the software and had subsequently violated the terms of the license.⁸⁵

2. Click-Wrap Agreements

Click-wrap agreements have had an easier time gaining acceptance than shrink-wrap agreements.⁸⁶ There is less dispute about the enforceability of click-wrap agreements because a click-wrap requires the user to click on an “I agree” button in order to proceed, eliminating the possibility that the license was not brought to the attention of the consumer.⁸⁷ Courts have found that click-wrap agreements are as enforceable as any other written agreement, despite the fact that they are mass market agreements.⁸⁸

Though the issue has not yet been litigated, click-wrap agreements would presumably survive a UCC section 2-207 analysis, as applied in *Step-Saver*.⁸⁹ A click-wrap agreement, appearing on the screen after the buyer has purchased the product, could be seen as a sign of conditional acceptance by the seller. To be complete, the contract would then require the buyer’s express assent, in the form of a click, to the terms dictated in the license agreement.⁹⁰ Failure to assent would mean that no contract was formed.⁹¹

IV. THE UCITA ON LICENSES

A. General Background of the UCITA

The Uniform Computer Information Transaction Act (UCITA) is a set

85. See *id.* The Seventh Circuit expanded on its validation of mass market licensing agreements in *Hill v. Gateway 2000, Inc.* by enforcing an arbitration clause similar to the one struck down in *Klocek*. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150–51 (7th Cir. 1997).

86. See generally *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 47 USPQ (BNA) 1020 (N.D. Cal. 1998).

87. See Davidson, *supra* note 18, at 1184–85.

88. See *In re RealNetworks*, 2000 WL 631341, at *3 (holding that a click-wrap license is a writing in the legal sense and enforcing an arbitration clause based on the user’s assent); *Hotmail Corp.*, 47 USPQ (BNA) at 1025 (enjoining a company from sending out junk e-mail via Hotmail’s service because the defendant agreed to Hotmail’s terms of service, assenting to a license agreement prohibiting junk e-mail).

89. See Keohane, *supra* note 30, at 450.

90. *Id.*

91. *Id.*

of laws useful to commerce in digital technologies.⁹² It started as a joint effort of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) to create a new article of the UCC, but due to disputes over the scope and content of the rules, it was released solely by the NCCUSL in July 1999 as the UCITA.⁹³ The UCITA was created because of the difficulties in applying the UCC (which was meant to apply to manufactured goods) to digital information.⁹⁴ The UCITA applies to computer information transactions, including transactions involving information that can be processed in or received from a computer.⁹⁵ The UCITA is the first general law to address the contractual issues raised by the information economy.⁹⁶

The UCITA is important to the discussion about the enforceability of browse-wrap licenses because its aim is to create rules applicable to digital technology. It includes provisions dealing explicitly with licenses and assent in the digital realm. The provisions and policies of the UCITA is instrumental in considering the debate over browse-wrap.

B. Specific Provisions of the UCITA

1. UCITA Section 112: Manifesting Assent; Opportunity to Review

Section 112 of the UCITA states that assent to a contract occurs when a person, after having an opportunity to review the terms of the deal, “authenticates the record” or engages in conduct that the person knows

92. See McDonald, *supra* note 27, at 462.

93. *Id.* The ALI and the NCCUSL worked together on the code for four years. *Id.* The split was caused by difficulties in incorporating the rules for digital information into the existing framework of the UCC. See Richard E. Spiedel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 612–13 (2001). Though it is a murky issue, the crux of the controversy seemed to center around whether certain provisions favored by the software industry could or should be altered to conform with the existing principles of the UCC. *Id.* Critics of UCITA believe that the split was caused by the NCCUSL giving in to industry pressure and refusing to create rules that would work with the UCC. See *id.* at 619. Whether this dispute between the ALI and the NCCUSL reflects negatively on the UCITA is uncertain. See Alvin C. Harrell, *UCITA: Opportunity or Obstruction?*, 25 OKLA. CITY U. L. REV. 333, 335 n.5 (2000). As one commentator pointed out, in the uniform law making process, disputes of this kind are inevitable, and say little about the final product, “which necessarily must represent a series of compromises between such divergent views.” *Id.* Today, two states, Virginia and Maryland, have adopted versions of the UCITA. McDonald, *supra* note 27, at 467, 470.

94. See Nimmer, *supra* note 17, at 3–4.

95. *Id.* at 6 (explaining that a computer information transaction is one in which the subject matter “information . . . is in, or is to be provided or created in, a form directly capable of being processed in or received from a computer”).

96. *Id.* at 4.

will signal assent to the other party.⁹⁷ This concept of assent differs from prior law in two important ways. First, the UCITA replaces the traditional signature requirement with the idea of authentication.⁹⁸ The concept remains the same as under the traditional signature requirement, but the UCITA broadly defines authentication as an execution or adoption of an electronic symbol, message, or process referring to or logically associated with the contract or an electronic record.⁹⁹ Second, the UCITA explicitly provides that parties can only assent to terms that they have had a chance to review.¹⁰⁰ This opportunity to review “requires that a record be available in a manner that ought to call it to the attention of a reasonable person.”¹⁰¹

According to the UCITA, assent by conduct occurs when a party acts, or refrains from acting, with the knowledge that his or her action or inaction will be taken as assent by the other party.¹⁰² A comment to the UCITA cautions that determining when assent by action occurs requires looking at the circumstances of the event.¹⁰³ In short, the UCITA allows for assent to be shown in any way as long as the assent is informed and the agreeing party had a chance to review the terms of the deal.

2. UCITA Section 208: Adopting Terms of Records

Under section 208 of the UCITA, a party adopts the terms of a contract once the party has shown assent to them. This provision explicitly includes standard forms.¹⁰⁴ UCITA section 208 further dictates that once terms are adopted, they become part of the contract regardless of the party’s knowledge or understanding of all of the terms, barring fraud or unconscionability.¹⁰⁵

The UCITA also supports the idea that contracts can be multilayered

97. U.C.I.T.A. § 112 (2001).

98. *Id.* cmt. 3(a).

99. *Id.* § 102(6)(B).

100. *Id.* § 112(a).

101. *Id.* cmt. 8.

102. *Id.* cmt. 3(b).

103. *See id.*

104. *Id.* § 208(1). The UCITA defines a standard form as “a record . . . containing terms prepared for repeated use in transactions and so used in a transaction in which there was no negotiated change of terms by individuals except to set the price, quantity, method of payment, selection among standard options, or time or method of delivery.” *Id.* § 102(a)(61).

105. *Id.* § 208 cmt. 7; *see id.* § 208(3).

and formed as part of a process, rather than all at one time.¹⁰⁶ It advances this idea by allowing for terms to be adopted after initial performance has begun, as long as the parties involved had reason to know that the agreement would be subject to later terms.¹⁰⁷ In short, if the parties have reason to know that the deal will be subject to later terms that flesh out the contract, the additional terms should be treated as if they were part of the initial agreement.¹⁰⁸

A comment to UCITA section 208 explains the “reason to know” standard for anticipating additional terms in a contract.¹⁰⁹ According to a comment to the UCITA, “‘Reason to know’ . . . does not require specific notice or specific language ‘Reason to know’ can also be inferred from the circumstances”¹¹⁰

3. UCITA Section 209: Mass Market Licenses

The UCITA provision concerning mass market licenses, section 209, stipulates that a party adopts the terms of a mass market license only if the party assents before or during that party’s initial performance or before initial access to the information.¹¹¹ Terms are not adopted if they are unconscionable or if they conflict with another expressly agreed upon term.¹¹² If a party does not have the opportunity to review the terms before being obligated to pay for the information, the party is entitled to return the product if the party does not agree with the terms.¹¹³

The UCITA explicitly endorses the use of mass market licenses, but limits their enforcement 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.¹¹⁴

V. IMPORTANT ISSUES IN MASS MARKET LICENSING

The enforceability of mass market licenses has engendered a lot of debate.¹¹⁵ Mass market licenses have come under attack from consumer

106. *See id.* § 208 cmt. 3.

107. *Id.* § 208(2).

108. *See id.* § 208 cmt. 3(a).

109. *Id.*

110. *Id.*

111. *Id.* § 209(a).

112. *Id.* § 209(a)(1)–(2).

113. *Id.* § 209(c).

114. *Id.* § 209 cmt. 2.

115. *See* Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547, 580 (1999).

advocates who claim that these licenses put consumers at an unfair disadvantage in the marketplace.¹¹⁶ Similarly, they have been attacked on grounds that they are adhesion contracts that allow licensors to wield too much power over consumers.¹¹⁷ Mass market licenses have also been criticized on grounds that the actions required to show assent to the licenses are unsatisfactory.¹¹⁸ All of these criticisms illustrate different aspects of the same concern—that consumers need to be protected from the unfair aspects of mass market licenses. In contrast, mass market licenses have been defended based on freedom of contract principles.¹¹⁹ Understanding the various concerns over consumer protection from mass market licenses, as well as the response from advocates of contractual freedom, is essential to dissecting the debate over browse-wrap.

A. The Unfairness of Mass Market Licenses

Much of the criticism of mass market licenses has come from commentators decrying the fact that consumers can be bound by terms that limit liability or require arbitration simply by the consumer's act of clicking a mouse or opening a box.¹²⁰ These arguments are based on general issues of fairness as well as issues of contractual fair dealing, or unconscionability.¹²¹ Critics claim that the long and sometimes onerous terms included in license agreements create a basic unfairness due to unequal bargaining power.¹²² In contract law, a term is procedurally unconscionable if it is somehow hidden in the fine print of a contract in such a way that the agreeing party is not put on notice of the term.¹²³

116. See *infra* notes 120–31. Though it is beyond the scope of this Article, it is important to note that mass market licenses for computer software have been criticized, and in certain cases nullified, for attempting to circumvent the laws of copyright. See *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (finding that a shrink-wrap agreement was preempted by federal copyright laws). See generally Apik Minassian, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 569 (1997).

117. See Lemley, *supra* note 39, at 1286–89.

118. See Harrison, *supra* note 46, at 937–38; Nimmer, *supra* note 10, at 44–45.

119. See *infra* notes 152–57 and accompanying text.

120. See Harrison, *supra* note 46, at 938 (arguing that click-wrap licenses should require more than a simple click to be valid); Lemley, *supra* note 39, at 1289 (arguing that failure to return a product should not signify assent to shrink-wrap license terms); Rustad, *supra* note 115, at 561–62 (describing consumer groups' opposition to the UCITA and mass market licenses).

121. See Lemley, *supra* note 39, at 1286–89.

122. *Id.*

123. See *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341, at *5 (N.D.

For example, a term may be found to be procedurally unconscionable if it is buried in the fine print of a long boilerplate contract. A contract term may be found substantively unconscionable if it is too one-sided or unfair, somehow representing an oppressive use of bargaining power.¹²⁴

Though they do not deal with fairness by name, the cases refusing to enforce mass market licenses illustrate court implementation of consumer protection policy.¹²⁵ In *Klocek v. Gateway*, the district court in Kansas refused to enforce a shrink-wrap agreement on the grounds that the license constituted an offer of additional terms that were never assented to by Klocek.¹²⁶ The court's reasoning reveals the intent to protect consumers. The court found that the terms of the contract between Klocek and Gateway were set once the computer was delivered and the terms of the shrink-wrap agreement were not objected to by Klocek.¹²⁷ The court reasoned that the inclusion of Gateway's standard licensing agreement with the box constituted additional terms. The court, applying Kansas's codification of UCC section 2-207, found that these additional terms were only valid if the other party had reason to know that the deal was dependent on the acceptance of the terms.¹²⁸ The court held that sending the license terms with the computer "did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the Standard Terms."¹²⁹

The decision in *Klocek* means that in Kansas a seller cannot sell goods and include additional terms with the delivery.¹³⁰ Gateway can no longer take a quick order over the phone and then ship the computer and the terms to a customer, who could then go over the terms at length. To enforce its standard license, Gateway must present all of its terms to a consumer before delivering the goods. Presumably, to complete an order over the phone, consumers must hear and agree to all of the terms of a license before they can purchase a computer from Gateway. This decision protects customers from unexpected terms, but it also increases transaction costs by forcing all of the terms of the deal to be explained and agreed to before shipment of the goods. This decision prohibits "pay now, terms later" deals and protects customers from unexpected terms, but it also creates inefficiency and limits the ways contracts may

Ill. May 8, 2000).

124. See U.C.C. § 2-302 cmt. 1 (2001).

125. See *Step-Saver Data Sys, Inc. v. Wyse Tech.*, 939 F.2d 91, 104-05 (3d Cir. 1991); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000); *Ariz. Retail Sys., Inc., v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993).

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

127. See *id.*

128. See *id.*

129. *Id.*

130. See *id.* at 1340-41.

be formed. Given the problems this decision creates for companies doing business in Kansas, it is apparent that the court's policy objective is consumer protection.¹³¹

Claims of unfair contracting in a license agreement were dealt with more explicitly in *In re RealNetworks, Inc.*, a case upholding a license agreement.¹³² In this case, Mr. David Keel claimed that the arbitration clause in the click-wrap license he agreed to before downloading free software from RealNetworks was both procedurally and substantively unconscionable.¹³³ Keel claimed that the license was procedurally unconscionable because it appeared in a pop-up window and the arbitration clause was couched in fine print under the heading of "Miscellaneous."¹³⁴ Keel also asserted substantive unconscionability, claiming that the arbitration clause, which set the forum in RealNetworks' home state of Washington, was unfair due to cost and distance.¹³⁵ The court rejected the claim of procedural unconscionability finding that the terms were not buried in fine print, but were presented in the same size type as the rest of the license. The court also noted that Keel had time to review the statement before agreeing because he could have printed it out.¹³⁶ As for the claim of substantive unconscionability, the district court found that the terms of the arbitration clause were not too onerous because the designation of any state as a forum is bound to be inconvenient to someone if the corporation involved has a national presence.¹³⁷

The UCITA is in step with cases like *In re RealNetworks* in that it relies on unconscionability and the public policy of protecting the public from unfair mass market licenses. In a sense, the UCITA's inclusion of an explicit requirement that consumers be able to review the terms of a deal before assenting to it codifies case law concerning procedural

131. The decision in *Klocek* is even more extraordinary, given that the court invalidated an arbitration clause despite the heavy presumption towards validating arbitration agreements. See Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract*, 32 COLUM. J.L. & SOC. PROBS. 275, 292 (1999) (noting that the Supreme Court looks very favorably on arbitration clauses and will not scrutinize them without evidence of fraud or coercion).

132. *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341, at *5-6 (N.D. Ill. May 8, 2000).

133. *Id.* at *5.

134. *Id.* at *5-6.

135. *Id.* at *6.

136. *Id.* at *5-6.

137. *Id.* at *6.

unconscionability.¹³⁸ The UCITA also includes guidelines for determining when a term in a record is conspicuous.¹³⁹ As for substantive unfairness, the UCITA includes a provision that allows judges to strike down terms that are unconscionable or terms that conflict with public policy.¹⁴⁰ This allows courts to do something about terms that they recognize as unfair without resorting to legal hairsplitting or the scrapping of an entire license agreement.

B. Mass Market Licenses as Adhesion Contracts

The rise of mass market licenses has also been criticized as an unwanted increase in the use of adhesion contracts.¹⁴¹ An adhesion contract is a form contract that is offered to buyers on a take it or leave it basis, typically by a party with superior bargaining power.¹⁴² These contracts do not involve any bargaining over terms and may be written to maximize the benefits to the party offering the deal.¹⁴³

Adhesion contracts are criticized because they allow parties in a strong bargaining position to insist upon terms that may be unfair.¹⁴⁴ Adhesion contracts are nothing new.¹⁴⁵ After all, a customer cannot call to order a pizza that is advertised for ten dollars and then try to haggle the price down to nine dollars. However, in terms of licensing, adhesion contracts are seen as dangerous for consumers that, with a lack of choice and a lack of

138. Holly K. Towle & Brian Dengler, *Contract Formation: Electronic Contracts and Online Terms*, in THE UCITA REVOLUTION: THE NEW E-COMMERCE MODEL FOR SOFTWARE AND DATABASE LICENSING 131, 138 (PLI Intellectual Prop. Course, Handbook Series No. G-600, 2000), available at WL 600 PLI/Pat 131. The drafters of UCITA adopted a type of "heightened unconscionability standard" rather than coming up with a laundry list of impermissible contract terms. Mary Jo Howard Dively & Carlyle C. Ring, Jr., *Overview of Uniform Computer Information Transactions Act*, in ADVANCED LICENSING AGREEMENTS FOR THE NEW ECONOMY 2001, at 201, 214-15 (PLI Intellectual Prop. Course, Handbook Series No. G-644, 2001), available at WL 644 PLI/Pat 201.

139. See U.C.I.T.A. § 102(14) (2001). A term is conspicuous under the UCITA if a reasonable person against whom it is to operate ought to have noticed it. *Id.* Conspicuous also includes terms that are presented in contrast to the surrounding words by being of a different color, of a larger size, or in all capital letters. *Id.*

140. *Id.* § 105(b).

141. See Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 354-55 (1999).

142. See *id.* at 324. Adhesion contracts are very common in everyday life. For example, a lease for an apartment is usually an adhesion contract because the terms are set in a standard form and most potential tenants are in no position to haggle over the terms of the lease.

143. See *id.* at 325-26.

144. See *id.*

145. See Gomulkiewicz & Williamson, *supra* note 31, at 343.

knowledge about licensing terms, could be locked into unfair licenses.¹⁴⁶

Supporters of mass market licenses point out the fact that “the vast majority of contracts in the United States are adhesion contracts.”¹⁴⁷ Moreover, if given the option, it seems unlikely that consumers would want to use time and resources to negotiate better terms for most mass market agreements.¹⁴⁸

Proponents of mass market licenses also point out that consumers are better served by relying on unconscionability, consumer protection laws, and competition within the market to protect them from unfavorable terms.¹⁴⁹ The Seventh Circuit took this position in *ProCD* by enforcing ProCD’s shrink-wrap license, stating that “[c]ompetition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy.”¹⁵⁰ This view is also represented by the UCITA, which specifically endorses the use of mass market licenses, but limits them by emphasizing public policy and requiring an opportunity for the potential licensee to review the terms.¹⁵¹

C. Assent

Another reason that mass market licenses have come under fire centers around contractual assent. Commentators and courts take issue with mass market licenses because the typical forms of assent to mass market licenses, namely opening a package or clicking a mouse, allow consumers to unwittingly signify assent to contract terms.¹⁵² For example, imagine a consumer who purchases a computer program that is subject to a shrink-wrap license. The consumer takes the program home, or if it was purchased over the Internet, receives it in the mail, and opens the package with the intent of using the program. The consumer has done what anyone would be expected to do—open the box—but he or she has also consented to a shrink-wrap license. Critics argue that this is dangerous for consumers who can become unknowingly obligated to

146. See Goodman, *supra* note 141, at 357.

147. See Gomulkiewicz & Williamson, *supra* note 31, at 343.

148. *Id.* at 344.

149. *Id.* at 345. Gomulkiewicz and Williamson point out that the software market has been unforgiving of companies that try to push unfair terms on buyers. They note that word spreads quickly among software buyers on the Internet. *Id.* at 345–46.

150. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996).

151. U.C.I.T.A. § 209 (2001). A comment emphasizes that standard form contracts are valid under general contract law as well as under the UCITA. *Id.* cmt. 4.

152. See, e.g., Goodman, *supra* note 141, at 354–55.

license terms.¹⁵³ Similarly, critics argue that a mouse click does not adequately manifest intent to assent to license terms that limit liability or force arbitration.¹⁵⁴ In short, detractors of mass market licenses believe that acts such as opening a box or clicking a mouse are not enough to show assent to the often complicated terms of mass market licenses.

The opposite of the subjective idea that licensees can only be bound by terms they know about is the idea of “objective assent.” The objective assent view of contract formation stands for the idea that people have a duty to read the terms of contracts, and any action that shows assent binds the assenting party to all of the terms of the deal, regardless of whether the terms were understood or not.¹⁵⁵ The objective assent view is almost universally accepted in contract law.¹⁵⁶ In terms of mass market licenses, objective assent means that potential licensees have a responsibility to read and understand the terms of license. It also means that they have the responsibility of understanding what acts will constitute assent to a license. Cases upholding shrink-wrap and click-wrap agreements illustrate the objective assent concept by requiring licensees to live up to the terms of licenses they have entered into despite claims that they did not agree to the particular terms.¹⁵⁷

The UCITA facilitates the objective assent model for mass market licenses by supporting a flexible definition of assent and allowing authentication through various means, from a simple click to the use of the product.¹⁵⁸ The potential unfairness of objective assent is tempered by the UCITA’s requirement that consumers be able to review the terms of licenses before assenting.¹⁵⁹ The UCITA also softens the blow of objective assent by emphasizing the role of unconscionability and public policy as methods of nullifying unfair terms.¹⁶⁰

153. *Id.*

154. *See* Harrison, *supra* note 46, at 937–38. Zachary Harrison suggested that click-wrap licenses should require something more tangible to show assent, such as typing out: “I assent to the terms of the license agreement.” *Id.* at 944; *see also* Nimmer, *supra* note 10, at 44–45.

155. *See* Harrison, *supra* note 46, at 937.

156. *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6, at 192–96 (2d ed. 1998) (stating that the objective theory of assent is now universally accepted).

157. *See In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341, at *6–7 (N.D. Ill. May 8, 2000) (finding that an arbitration agreement in a click-wrap license is binding because the licensee had a chance to review the terms of the deal and showed assent by clicking).

158. *See* U.C.I.T.A. § 112 (2001); *id.* § 208; *see also* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (finding that terms contained in a shrink-wrap license agreement were enforceable based on the licensee’s assent by using the product).

159. *See* U.C.I.T.A. § 112.

160. *See id.* § 105(b).

D. Freedom of Contract Versus Regulation

Arguments in support of objective assent in contract are closely related to the idea that mass market licenses should be enforced on freedom of contract principles. Freedom of contract is the idea that people should be given “the dignity of being considered capable of making and standing by their own agreements.”¹⁶¹ In terms of mass market licenses, the freedom of contract principle stands for the idea that sellers have a right to create licenses that require assent be given by opening a box or clicking a mouse. The freedom of contract principle also provides that consumers should be able to enter into these licenses if they are so inclined and should be trusted to avoid entering into agreements that are unfair.

ProCD exemplifies the freedom of contract principle as a justification for enforcing a mass market license. The court in *ProCD* dealt with a typical shrink-wrap license in which the buyer was asked to show assent by using the software, or if not, to return the product. The *ProCD* court found that the shrink-wrap license was valid.¹⁶² The court stated that the principles of contract, codified in the UCC, permit contracts to be formed in many ways.¹⁶³ By finding the license valid, the court in *ProCD* upheld the right of a party to propose a contract to a consumer in a unique way, as well as the idea that consumers, as responsible people, should be bound by the contracts they choose to form.

The argument in response to freedom of contract mirrors the unfairness arguments discussed earlier. Detractors of mass market licenses claim that consumers are at a bargaining disadvantage when entering into licenses.¹⁶⁴ Critics believe that this disadvantage in bargaining is exacerbated by the pay now, terms later format used to create many licenses. They argue that the format commonly used in shrink-wrap licenses allows a consumer, who probably considers the transaction complete when money changes hands, to be bound by a complex license that can only be read at a later time.¹⁶⁵ In short, critics of mass market licenses believe that the unequal positions of the producers of

161. Lorin Brennan, *The Public Policy of Information Licensing*, 36 HOUS. L. REV. 61, 86 (1999) (“Some courts have declared freedom of contract to be a fundamental right.”). Freedom of contract is also protected by Due Process. *Id.*

162. *See ProCD, Inc.*, 86 F.3d at 1452.

163. *See id.*

164. *See Goodman, supra* note 141, at 356–58.

165. *See id.* at 354–55.

information technologies and consumers make regulation of mass market licenses preferable to freedom of contract.¹⁶⁶

VI. THE ENFORCEABILITY OF BROWSE-WRAP LICENSES

There is little doubt that wrap style mass market licenses are here to stay. Information technologies have already become an integral part of the U.S. economy,¹⁶⁷ in part because of the ease of contracting made possible by standardized licensing agreements.¹⁶⁸ Despite debates in the courts or among commentators, wrap licenses have become the normal way that contracts dealing with digital information are formed.¹⁶⁹ The use of browse-wrap as a way to form licenses is the next logical step in the evolution of contracts in the information age.

A. Criticism of Browse-Wrap

Up to this point, browse-wrap has received little attention from commentators or courts. The few courts dealing with browse-wrap have found that it is not an enforceable way of forming a mass market license.¹⁷⁰ The holdings against browse-wrap have centered around issues of assent, but the decisions also echo the same general policy concerns that surround shrink-wrap and click-wrap licenses. The best way to understand why browse-wrap has received such a poor reception is to examine the rulings that have denied its enforceability.

In *Specht v. Netscape Communications Corp.*, a New York district court dealt with an invasion of privacy case that the defendant, Netscape, claimed was subject to an arbitration agreement.¹⁷¹ The agreement to arbitrate was contained in a license covering free software made available by Netscape on its Web site.¹⁷² Specht had downloaded the software from Netscape and later sued as part of a class action claiming that the software invaded the privacy of its users by transmitting private

166. See Rustad, *supra* note 115, at 561–62.

167. See Nimmer, *supra* note 17, at 3.

168. See Gomulkiewicz & Williamson, *supra* note 31, at 341–43.

169. See Diane Duhaime, *Legal Developments in Computer and Electronic Contracting: Uniform Commercial Information Transaction Act*, in FIFTH ANNUAL INTERNET LAW INSTITUTE 429, 434 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. G0-00NC, 2001) (noting that it is common practice for software to include agreements governing the use of the software), WL 662 PLI/Pat 429; Nimmer *supra* note 17, at 5 (stating that most computer information transactions involve licenses or online access contracts).

170. See *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 591–96 (S.D.N.Y. 2001); *Ticketmaster Corp. v. Tickets.com, Inc.*, 54 USPQ 2d (BNA) 1344, 1346 (C.D. Cal. 2000).

171. *Specht*, 150 F. Supp. 2d at 587.

172. *Id.* at 587–89.

information.¹⁷³ The software could be obtained by clicking a download button on the Web site. Next to the download button was a hypertext link advising users that they should read a license agreement before downloading or using the software.¹⁷⁴ The license could be displayed by clicking the link.¹⁷⁵ The license included a provision requiring any disputes arising from use of the software to be settled by arbitration and also stated that anyone who downloaded or used the software had agreed to the license.¹⁷⁶

The court's analysis centered on the issue of whether users who downloaded the software had truly assented to the license.¹⁷⁷ The court, after comparing the license to shrink-wrap and click-wrap, found that it was a browse-wrap license.¹⁷⁸ The court noted that while shrink-wrap and click-wrap both include an action that shows unambiguous assent to the license, the browse-wrap license used by Netscape allowed users to get the software without performing such an action.¹⁷⁹ The court found that because users did not have to click "I agree" or open a box before using the program, there was no evidence of a meeting of the minds as to the license.¹⁸⁰ In response to Netscape's contention that the act of downloading showed assent, the court found that because the users were not given sufficient notice of the license, they had no reason to know that their actions would constitute assent.¹⁸¹

A district court in California followed a similar line of reasoning in *Ticketmaster Corp. v. Tickets.com., Inc.*¹⁸² Ticketmaster ran a Web site where people could buy tickets to a variety of events.¹⁸³ The Web site's homepage displayed terms and conditions for the use of the site that prohibited, among other things, the copying of information on the Web site for commercial purposes.¹⁸⁴ The terms also included a provision

173. *Id.* at 587. Specht claimed that the Netscape was involved in unlawful electronic surveillance because the software allegedly transmitted information about the user's file transfer activity on the Internet. *Id.*

174. *Id.* at 588.

175. *Id.*

176. *Id.* at 588–89.

177. *See id.* at 591.

178. *Id.* at 591–95.

179. *Id.* at 595.

180. *See id.*

181. *See id.*

182. 54 USPQ 2d (BNA) 1344 (C.D. Cal. 2000).

183. *Id.* at 1345.

184. *Id.*

stating that anyone who went beyond the Web site's homepage had agreed to the Web site's terms.¹⁸⁵ Tickets.com copied information from Ticketmaster's Web site to use as part of its own ticket sales Web site, prompting Ticketmaster to sue.¹⁸⁶

The court found that the terms and conditions on the site were not enforceable because users were not given proper notice of the terms and therefore could not consent.¹⁸⁷ In response to Ticketmaster's contention that the agreement made in this case was no different than a shrink-wrap license, the court concluded that while shrink-wrap terms are "open and obvious," the terms at issue here were hard to find because users might need to scroll to the bottom of the screen to read them.¹⁸⁸

The decisions in *Specht* and *Ticketmaster* place great emphasis on whether assent was given to the license terms. Both decisions turn on the idea that the licenses could not have been valid without an act that unambiguously signals assent to the terms. By requiring an act that refers to assent and only to assent, the courts in these two cases are seeking to protect consumers. This policy choice parallels decisions that refuse to enforce shrink-wrap licenses because consumers are not properly informed about the terms of the deal. In the browse-wrap cases, the courts are supporting a policy that requires an explicit act of assent from users so that users will not be unwittingly bound by terms. The key question concerning the future of browse-wrap is whether this policy of protection is necessary or beneficial.

B. A Defense of Browse-Wrap

In the words of Raymond T. Nimmer: "The world has changed."¹⁸⁹ There can be no question that the advent of digital technologies, such as the Internet, and the resultant "death of distance"¹⁹⁰ have changed the way the world works. Today, people can buy almost any item from anywhere in the world with the click of a mouse. The Internet has also fostered new ways for people to contract for goods. Rapid change of

185. *Id.* at 1346.

186. *Id.* at 1345.

187. *Id.* at 1346.

188. *Id.*

189. Nimmer, *supra* note 10, at 5. Raymond Nimmer was Reporter to the Drafting Committee on the UCITA and has written an award winning book on the law of computer technology. See Nimmer, *supra* note 17, at 3.

190. The death of distance is the idea that new technologies have negated the importance of geographic location and geographic difference. For example, the communication enabled by the Internet allows companies to sell items to anyone in the world in the same manner as to a neighbor. For a detailed discussion of the topic, see generally CAIRNCROSS, *supra* note 1.

this kind often brings about calls for regulation.¹⁹¹ The contracting possibilities made possible by the Internet have brought about a desire for the certainty and perceived safety of the status quo. This desire is reflected in the *Specht* and *Ticketmaster* decisions that refuse to enforce browse-wrap. But this is not a time to protect society from the new possibilities of contracting tools, such as browse-wrap. As one expert suggests, the market for information products should be regulated by market forces, not fenced in by judicial protections of the public.¹⁹²

Digital mass market licenses, such as browse-wrap and click-wrap, are an example of the change brought about by new technology. The prevalence of wrap-style licenses in today's economy grew out of the need for information products, which must be licensed to the public affordably.¹⁹³ Information products, such as software, must be licensed in order to protect the investment of software producers. In order to sell information products affordably to the mass market, the licenses must also be standardized.¹⁹⁴ Simply put, licenses are a necessary part of business in the information marketplace. In turn, in order to get information products with the ease and convenience of the Internet, it is necessary to enter into a license over the Internet.

Consumers who take advantage of the Internet are faced with more responsibilities because they now have the opportunity to assent to these wrap-style licenses. It must be noted, however, that these are not new responsibilities. These licenses are merely contracts and should be enforced as such. Admittedly, dealing with a license for software is more complicated and requires more responsibility than simply purchasing a toaster. With a toaster, once you have left the store, the deal is complete.¹⁹⁵ Buying software requires the purchaser to read terms about complicated things like arbitration and limited use, and may even require the buyer to send the software back if the terms are unsatisfactory. These added responsibilities are the price that must be paid to reap the benefits of the digital age. Moreover, these responsibilities are nothing new to contract law.

191. See Nimmer, *supra* note 10, at 6 (noting that there are no examples of when calls for regulation have succeeded in the face of true economic and social change).

192. *Id.*

193. See Gomulkiewicz & Williamson, *supra* note 31, at 342.

194. *See id.*

195. Of course, this is not entirely true, considering that even a toaster will no doubt include a warranty, the terms of which were unknown to the buyer when the purchase was made.

Browse-wrap licenses are not unlike typical contracts.¹⁹⁶ In a browse-wrap license, the offeror makes an offer of an information product, and invites assent from a potential user of the product. With browse-wrap, this assent is invited in the form of an action, like using the software that allows the user to proceed into the interior of a Web site. Browse-wrap is different from the other type of digital licensing tool, click-wrap, in that the assent required in browse-wrap can be seen as ambiguous. Though this is unique in the digital realm, the idea that an ambiguous act can mean assent is by no means new to contract law. If a seller requires acceptance be shown by the buyer nodding his head, that acceptance is valid as long as the buyer had reason to know that his nodding would bind him to the deal. People nod for many reasons, but if the buyer is informed about the significance of the act, the deal is made. The same should hold true for browse-wrap. If proper notice is given that the potential licensee's action of using the software to proceed into the Web site will be seen as assent, then any contract formed by the assent should be enforced. This should be so even if the assent is not given by an explicit act provided solely for the purpose of assent, like clicking "I agree."

Despite the fact that assent to a contract can be shown in any number of ways, browse-wrap has been invalidated because of the possible ambiguity of the assent it requires.¹⁹⁷ In both *Specht* and *Ticketmaster*, the courts found that the browse-wrap licenses were not effective because users had not clearly assented to them. If the issue is simply one of notice of the terms, the problem can easily be fixed by making the terms more noticeable. However, the holdings in these cases go deeper than that. The court in *Specht* reasoned that a typical shrink-wrap license allows for proper notice, but that the hyperlink mentioning the license used by Netscape did not.¹⁹⁸ It is hard to imagine how a sticker on a box of software is any more or less conspicuous than a hyperlink. The courts seem to be saying that explicit action is needed to form a license on the Internet and that they will not enforce licenses formed by acts that could be seen as ambiguous, such as going forward on a Web site or downloading a program.

This stance runs up against a basic tenet of modern contract law, namely, that assent can be shown in any manner necessary to show

196. In some ways, browse-wrap is more advantageous to the licensee than other types of licenses because it allows users to review the terms before accepting, unlike shrink-wrap, and it allows users to keep the license on their computer for later reference.

197. See *Specht v. Netscape Communications, Inc.*, 150 F. Supp. 2d 585, 594–95 (S.D.N.Y. 2001); *Ticketmaster Corp. v. Tickets.com, Inc.*, 54 USPQ 2d (BNA) 1344 (C.D. Cal. 2000).

198. *Specht*, 150 F. Supp. 2d at 595–96.

agreement.¹⁹⁹ This position can be explained by considering the main policy behind limiting mass market licenses—consumer protection. The courts in *Specht* and *Ticketmaster* upheld the proposition that these sorts of licenses have important legal consequences and that people should not be allowed to enter into them without manifesting assent in prescribed ways, such as clicking a mouse. In this way, courts are protecting consumers from the perils of contracting made too easy by the Internet.

This sort of protection is neither appropriate nor necessary. The courts in these two cases have drawn an arbitrary line between licenses that are formed by opening a box or clicking a mouse and licenses that are formed by acts that may be considered ambiguous, such as downloading software or proceeding into a Web site. However, browse-wrap, when done properly, is no different than any other sort of mass market license, or any contract for that matter. If users are given proper notice that they are entering into a license, and if the terms are available for review, the license should be enforced. An artificial distinction between browse-wrap licenses and other wrap style licenses will limit the way contracts can be formed over the Internet. By requiring a click for a license to be valid, courts ignore the fact that people have a right to form contracts in any way they choose. Moreover, this distinction abandons the idea that people are bound by terms that they assent to, whether they have read them or not.²⁰⁰

The distinction between browse-wrap and other types of licenses is illogical, unnecessary, and potentially detrimental to the future development of Internet commerce. No one knows the direction that future technologies will take. When the Internet began gaining global attention, a hands-off sentiment prevailed because it was thought to be dangerous to burden the possibilities of the new technology with unnecessary regulation.²⁰¹ The same idea should apply to browse-wrap. Courts may think that simply requiring a person to click “I agree” will not make much of a difference. Today that might be true, but the future is untold. Browse-wrap is not unlike other types of contracts and should not be limited without first finding some fundamental reason for doing so.

199. U.C.C. § 2-204(1) (2001).

200. See 1 FARNSWORTH, *supra* note 156, at 193–94.

201. See CURRIE, *supra* note 5, at 53. The U.S. government has outlined key principles in its approach to the Internet, which include the idea that the private sector should lead the growth of the Internet, that government should avoid undue regulation of the Internet, and that government should recognize the unique qualities of the Internet. *Id.*

Confining Internet contracting in this way could have untold effects on the future of contracting in the digital arena. One example might be seen in the near future as electronic agents, or “bots,” become widely used in the electronic marketplace. A bot is a software program that automatically searches the Web for whatever it is programmed to find.²⁰² There is considerable interest in using bots to act as agents that interact with other bots to negotiate for goods using preset preferences, such as price, quantity, and even bargaining strategy.²⁰³ In the near future, consumers will be able to preprogram a bot to go out and find a specific item. That “buyer bot” will interact with “seller bots” until a deal is made.²⁰⁴ These interactions will be dependent on standardized forms—no informed, affirmative negotiations will take place.²⁰⁵ If limitations are placed on how consumers can enter into contracts now, this sort of automated commerce could be jeopardized. If buyers are forced to agree to licenses by clicking “I agree,” doing business through bots will be far less efficient.

Limitations on browse-wrap are also misguided because consumers can be protected from unfair licensing terms in many ways—ways that do not chill the possibilities of contracting on the Internet. For example, consumers can rely on unconscionability, the contract maxim that agreements are to be construed against the drafter, and consumer protection laws.²⁰⁶ Consumers are also protected by the forces of the market.²⁰⁷ This is particularly true with Internet commerce where information about unfair dealing is never in short supply.²⁰⁸ Of course,

202. Brennan, *supra* note 161, at 111. An example of a simple bot is a program that allows a user to type in the name of a music CD and then the bot retrieves the prices for that CD from all of the merchants on the World Wide Web. *Id.* at 113. The UCITA already anticipates the use of electronic agents in commerce. The UCITA defines an electronic agent as: “a computer program, or electronic or other automated means, used independently to initiate an action, or to respond to electronic messages or performances, on the person’s behalf without review or action by an individual at the time of the action or response to the message or performance.” U.C.I.T.A. § 102(27) (2001).

203. *See* Brennan, *supra* note 161, at 112–14. A buyer bot could be programmed to emulate various moods, varying, for example, between “anxious, cool-headed, and frugal.” *Id.* at 113.

204. *Id.* at 113–14.

205. *See id.* at 114–15.

206. *See* Gomulkiewicz & Williamson, *supra* note 31, at 345. It is also important to note that not all mass market licenses seek to take advantage of consumers. Though it is tempting to assume that licenses are one-sided and designed to give the maximum advantage to the licensor, some licenses actually give users of software more rights than are legally required. *See* Brennan, *supra* note 161, at 87 (discussing a software license that grants users rights beyond those provided by copyright law).

207. *See* Gomulkiewicz & Williamson, *supra* note 31, at 345. The protection of the market was also a major factor in cases upholding shrink-wrap licenses. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).

208. *See* Gomulkiewicz & Williamson, *supra* note 31, at 345–46 (noting that

Internet consumers will be best protected by their own caution and good sense.

Following the same logic, the UCITA rejects the idea of overt regulation as an unnecessary restraint on commerce.²⁰⁹ The UCITA's broad take on assent in contracting validates the forms of assent that are used for browse-wrap. That is, by basing assent on authentication,²¹⁰ the UCITA makes it possible for licenses to be created in any way intended by the parties to form the license. The UCITA does not really break new ground in this regard; it merely "codifies and clarifies" the common law.²¹¹ This view of assent is tempered by the requirement that a licensee have a chance to review all terms before assent can be given.²¹² The UCITA also relies on unconscionability to address any unfairness created by mass market licenses.²¹³ The UCITA also allows judges to strike down licensing terms that conflict with public policy.²¹⁴ In summation, the UCITA endorses flexibility in assent that allows people to make full use of the possibilities for doing business on the Internet, while relying on the pressures of the market and the pre-existing checks on unfairness to protect consumers.

VII. A SUGGESTION TO COURTS AND LEGISLATURES

The state of uncertainty concerning the enforceability of licenses is incongruent with the reality of today's marketplace, where mass market licenses are a fact of life. This situation can best be rectified by legislative action. Although states may be wary of passing the UCITA in its entirety,²¹⁵ it is important that state legislatures consider passing legislation that explicitly recognizes the enforceability of wrap-style licenses. By doing so, lawmakers can remedy any confusion that exists

software users have formed organizations to monitor and influence licensing terms offered by software companies and that criticism on the Internet is "swift, blunt, caustic, and spreads quickly").

209. See Nimmer, *supra* note 17, at 4.

210. See U.C.I.T.A. § 102(6) (2001); *id.* § 112 cmt. 3.

211. Nimmer, *supra* note 10, at 43.

212. See U.C.I.T.A. § 112 cmt. 8.

213. *Id.* § 111.

214. *Id.* § 105(b).

215. Two states have passed the UCITA into law. Virginia adopted almost the whole code, see McDonald, *supra* note 27, but Maryland adopted its own version that included some added measures of consumer protection. See *id.* at 470–72. For example, the Maryland version requires that notice to license terms be available before and after assent is given to a license. *Id.* at 472.

concerning these licenses and create a uniformity of rules to help foster Internet commerce.²¹⁶ Any legislation should also include a definition of assent that is flexible enough to allow for assent to be shown in many ways. This should include the forms of assent typical to browse-wrap. Any proposed legislation for mass market licenses should also follow the lead of the UCITA by endorsing the use of public policy considerations to nullify unfair terms in licenses.

If states are slow in enacting the necessary legislation, it will be up to the courts to solidify the position of mass market licenses. Courts should make it a point to treat browse-wrap licenses just as they treat any other sort of license. Courts must allow browse-wrap licenses that give proper notice to consumers to be enforceable regardless of how they are formed. These licenses should only be invalidated if they are objectionable on basic contract principles, and then only using existing means of protecting consumers, such as unconscionability. Browse-wrap should not be deemed entirely unenforceable simply because it is new.

VIII. CONCLUSION

Shrink-wrap and click-wrap already play a central role in mass market licensing; browse-wrap is simply the next step in the process. The artificial distinctions made between browse-wrap and the other wrap-style licenses is an attempt to hold back the tide of progress in the name of consumer protection. Information technology has made the contracts entered into by the general public more sophisticated, but there is no reason to believe that consumers cannot handle these added responsibilities. Accordingly, it is time for the courts to treat the public as sophisticated players in their own commercial lives. Browse-wrap licenses are new in form but not in substance.

In the end it may not be important whether courts require licenses created on the Internet to include the clicking of "I agree," but the future of electronic commerce is uncertain. In the past decade, information products available over the Internet have increased tremendously in both type and number. As this growth continues, the need for flexibility in

216. On the need for uniformity and clarity in electronic commerce, see Nimmer, *supra* note 17, at 5–6. Nimmer states:

The need for clarity is vivid in electronic commerce. Online systems have changed how transactions occur and many information transactions are performed. Yet many issues in contracting online are unanswered. A modern contract law must provide guidance on those issues and many others; failure to do so does not foster, but impedes, commerce in computer information.

Id. at 6.

contracting will grow as well.²¹⁷ Limiting the way that contracts can be formed over the Internet at this point is illogical, unnecessary, and could have a potentially dangerous chilling effect on the future of electronic commerce.

DAN STREETER

217. See Gomulkiewicz & Williamson, *supra* note 31, at 362.

