CLICKING AND CRINGING

Nancy Kim, California Western School of Law
CLICKING AND CRINGING

By

Nancy Kim*

Shrinkwrap, clickwrap and browsewrap licenses have complicated contract law by introducing non-traditional methods of contracting to govern the use of software. The retention of the underlying intellectual property by the licensor, and the malleable qualities of software, give rise to the ability and the need to set parameters of use. The courts have tended to defer to the ownership rights of licensors by claiming that there is valid contract formation, even in “rolling contract” situations. Some commentators have argued that existing contract law doctrines – such as unconscionability and good faith – are sufficient to address digital-era contracting dilemmas. While such arguments have their place in discussions about contract enforcement, because these doctrines are standard contract defenses, they fail to explain a finding of contract formation. In this Article, I propose a theory for non-negotiated software licenses. A consumer’s assent to a transaction should not be transmuted into blanket assent to each individual term of a non-negotiated contract. Instead, the concept of “assent” should be bifurcated into two parts, actual assent and presumed assent. Actual assent means express agreement, not simply to the transaction, but to each of the individual material terms. Presumed assent means that the licensee, by expressly agreeing to the transaction, may also be presumed to have assented to certain of the contract terms. The licensee should not be presumed to have assented to all contract terms, however, as is currently the case under the “blanket assent” approach to contracts. Whether the licensee’s assent to a given term may be presumed depends upon the operative effect of the term. The licensee may be presumed to have assented to provisions governing the “scope of license” or the “terms of use” (as further defined) to the software or website because such terms establish the conditions upon which the licensor has agreed to make the digital information available. The licensee’s performance under the contract, however, would be conditioned upon notice. Furthermore, the caption heading of “scope of license” or “terms of use” would not be determinative. The licensee should not be presumed to have assented to provisions that impose affirmative obligations or purport to take away the licensee’s legal rights. Part I of this Article introduces the doctrinal problems related to non-negotiated software licenses. Part II proposes a 2-part methodology that first analyzes whether the putative licensee has assented and the nature of that assent (i.e. whether it is general assent to engage in a transaction or whether it manifests assent to the disputed term). The second step examines what terms govern the activity and determines enforceability according to the nature of the assent. Part III summarizes and analyzes the current case law using my proposed methodology, and applies the methodology to a sample license agreement. Part VI concludes that a presumption of assent to license terms and a requirement of actual assent to other material terms both respects the integrity of contract doctrine and accommodates business realities. A requirement of active assent affects the consumer experience and is therefore likely to influence contracting behavior.
TABLE OF CONTENTS

I. Introduction........................................................................................................................................................................1

II. The Problem of Assent and the Non-Negotiated License..........................................................12
   A. Actual Assent v. Presumed Assent..........................................................16
      1. Is Software Really Different?..............................................................17
   B. The Operative Effect of Terms: Why it Matters.........................................22
      1. Affirmative Obligation Provisions.......................................................29
      2. Provisions that Take Away Legal Rights............................................35
      3. Using UCC Article 2 to Provide Default Terms..................................37

III. Making Sense of Non-Negotiated Software Licenses.........................................................39
   A. An Overview of the Law Governing Non-negotiated Licenses...............39
      1. Shrinkwrap Licenses..........................................................................39
      2. Clickwrap Licenses............................................................................45
      3. Browsewrap Licenses.........................................................................50
   B. Balancing Individual Autonomy with Business Interests.........................52
   C. Sample License Analysis.......................................................................60

IV. Conclusion.........................................................................................................................................................................65
INTRODUCTION

This Article seeks to expand the current discussion governing software licenses and argues that the *sui generis* nature of software licenses often necessitates deviations from the classical contract model of bargaining. A software license enables the licensee to use but not own the software. The intangible and malleable qualities of software, and the retention of the underlying intellectual property rights by the licensor, give rise to the ability and the need to set parameters of use.¹ This does not mean that when it comes to software licenses, the licensor’s exercise of ownership should be unchecked or that the licensee’s rights should be unduly restricted. It does, however, mean that contract and commercial law doctrines may conflict with and offend notions of fair play in business transactions. This Article proposes a methodology that respects the integrity of contract doctrine while taking into consideration the business realities involved in licensing software.

Legal commentary of software licenses tends to be limited to discussion of non-negotiated agreements, such as shrinkwraps, clickwraps, and browsewraps,² and often lumps these three types of licenses together.³ In fact, software is licensed in a variety of ways. In many cases, the licensee enters into the license “agreement” simply by opening

*Associate Professor, California Western School of Law. The author incorporated many helpful comments received when an earlier version of this paper was presented at the Conference of Asian Pacific American Law Professors, William Mitchell School of Law, April 27-28, 2007, the Stanford/Yale Junior Faculty Form, Stanford Law School, May 18-19, 2007, and the faculty development workshop at California Western School of Law. Special thanks to Tom Barton, Seth Burns, Richard Craswell, Mike Dessent, Paul Goldstein, Cynthia Ho, Tom Joo, Mark Lemley, Judith Resnik, Alan Schwartz, and Bob Scott for their insights and suggestions.

¹ See Maureen A. O’Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 484-86 (1995) (describing the public goods problem as “particularly acute” in the case of software which is easily copied and distributable).

² See generally *id.*

³ While the interplay of contract and property concepts arises in all software licensing transactions, I limit myself in this Article to discussion of non-negotiated licenses only.
the package containing the software. In many other cases, however, the licensee has spent months negotiating the terms of the license agreement. A software license encompasses both extremes as well as variations in between. The focus of this Article, however, is solely on the problem of assent with respect to non-negotiated shrinkwrap, browswrap, and clickwrap licenses.4 A shrinkwrap license refers to an agreement that is wrapped in plastic and included with a disc containing a software program.5 The licensee manifests assent to the terms of the shrinkwrap either by tearing open the plastic wrap containing the software, or by installing the software.6 A clickwrap agreement is electronically transmitted and requires clicking on a button indicating assent prior to downloading software or accessing a website.7 A browswrap license purports to bind an individual accessing a website but does not require the user to expressly manifest assent.8

Cases, scholarship, and professional organizations evaluating non-negotiated software licenses have tended to focus on the issue of contract formation, and specifically, on the matter of assent.9 In many cases, the consumer or putative licensee does not actually read the software license terms but the courts have nonetheless found the requisite “assent” necessary for contract formation. In so doing, this Article argues

---

4 I reserve for another day the other relevant contract formation issues of offer/acceptance and consideration.
6 See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).
8 Id. See also Christina L. Kunz et al., Browse Wrap Agreement: Validity of Implied Assent in Electronic Form Agreements, 59 BUS. LAW. 279 (2003) [hereinafter Kunz, Browse Wrap Agreement]. While browswraps agreements often do not involve the downloading of software, they do purport to govern a licensee’s access and use of a licensor’s website. Because a website owner has a proprietary interest in its website, I do not distinguish between browswraps used to download software and those used merely to govern use of a site.
9 See the cases discussed infra Section III. The American Bar Association (“ABA”) Joint Working Group on Electronic Contracting Practices recently completed a two-part project on the validity of the assent process in electronic form agreements. The first part of the project focused on click-wrap agreements. See Christina L. et al., Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent, 57
that the courts are deferring to the licensor’s business interests and the policy of facilitating business transactions rather than reaching an inevitable conclusion of assent under contract law. This Article refers to the judicial finding -- and in some instances, construction -- of assent in these cases as “presumed assent.”

In this Article, I argue that resorting to presumed assent is often necessary, and desirable, to address the unique business needs associated with licensing software. Currently, courts purport to find actual assent where none exists in an attempt to enforce contracts that provide a net benefit to society.\(^\text{10}\) Yet, while a finding of presumed assent sometimes may be necessary to enforce socially desirable contracts, certain parameters should be set around such a legal construct. A failure to do so imposes \textit{in toto} contract law principles that were established with consenting parties as a premise\(^\text{11}\) upon a transaction that occurred without one party’s actual consent.\(^\text{12}\) The judicial transmutation

\(\text{BUS. LAW. 401 (2001). The second part of the project examined assent in the context of browse wrap agreements. See Kunz, Browse Wrap Agreement, supra note 8.}\)

\(\text{\(^\text{10}\) As Richard Craswell states, in some cases, the costs of obtaining a party’s “proper” consent depends heavily on “just what is deemed necessary for [such party’s] consent to be proper.” Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 CHI. L. REV. 1, 9-10 (1993). Craswell further states that as a result, in some cases, such as fine print contracts, it may be appropriate to adopt a liability rule to avoid the unnecessary expense of ensuring consent is proper. Id. at 10-11. See also Richard A. Epstein, Contract, not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION ECONOMY’ 205, 208-14 (Jane K. Winn ed., 2006) (observing that different software products require different kinds of solutions which cannot be anticipated by the government and that current licensing practices have “unleashed an unprecedented wave of new firms and products” that have benefited consumers).}\)

\(\text{\(^\text{11}\) See Friedrich Kessler, Contracts of Adhesion – Some Thoughts About Freedom of Contract, 43 COLUM L. REV. 629, 638-39 (1943) (stating that adhesion contracts do not fit within the traditional contract law framework).}\)

\(\text{\(^\text{12}\) Id. at 633 (stressing the need to “remain fully aware” that the use of the word “contract” does not “commit us to an indiscriminate extension of the ordinary contract rules to all contracts.”) The effect of assuming actual assent where there is none has led to some disheartening results. See, e.g., Rinaldi v. Iomega Corp., No. 98C-09-064 RRC, 1999 Del. Super. LEXIS 563 (Del. Super. Ct. Sept. 3, 1999). (upholding a warranty disclaimers as “conspicuous” even though it was contained within product packaging. In reaching its conclusion, the court relied upon the reasoning of ProCD, Inc. v. Zeidenberg, which also upheld a rolling contract, although the disputed terms pertaining to the license grant. As Stephen Friedman points out, there is dicta in ProCD that cautions against applying that case’s rationale to disclaimers of the implied warranty of merchantability: ‘That dicta indicates that even if ‘money now, terms later’ may be fine for certain types of contracts terms (such as the ProCD license term which limited}\)

I propose that rather than purporting to find actual assent in order to enforce a license agreement, the courts should expressly acknowledge the use of presumed assent.

This Article further argues that, given the lack of actual agreement to terms, contract law’s deference to industry norms is troubling and misplaced. In order to render a contract unenforceable on the grounds of unconscionability, the terms of the contract are considered “in the light of the general commercial background and the commercial needs of the particular trade or case.” Modern contract law and the Uniform Commercial Code (the “U.C.C.”) state that contractual terms that reflect trade usage or industry standards should be interpreted as part of the contract. Corbin suggests that the test should be whether the terms are “so extreme as to appear unconscionable according to the mores and business practices of the time and place.” But where there is a pronounced unevenness in the bargaining power within the industry, a set of industry


14 For a discussion and analysis of the doctrine of unconscionability, see Arthur A. Leff, *Unconscionability and the Code – The Emperor’s New Clause*, 115 U. Pa. L. Rev. 485 (1967). Leff sets forth a framework for analyzing claims of unconscionability that entails both the manner in which the contract was entered into (i.e. whether there was “procedural” unconscionability) and whether the terms were fair (i.e. whether there was “substantive” unconscionability). *Id.* at 486-88.


16 See U.C.C. § 1-205 (“…any usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.”); RESTATEMENT (SECOND) OF CONTRACTS § 222 (1978) (“Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.”) *Id.*
standards or “norms” may be established that reflects the interests of only one side.\textsuperscript{18} Using industry standards as a guideline where contracts of adhesion\textsuperscript{19} are involved merely reinforces the overreaching by the party with greater bargaining power.\textsuperscript{20} While the licensing of software is conceptually different from the sale of goods, many of the contractual problems arising from, and associated with, software licensing stem, not so much from the \textit{sui generis} nature of software itself, but from the concerted effort by licensors to create standard, one-sided terms. Concerted efforts by software licensors to establish and shape licensing norms create industry standards that consumers soon learn to expect, even if consumers are personally opposed to those norms. This type of private legislation by the software industry is similar to norms that have been established in other industries\textsuperscript{21}, most notably, the insurance industry.\textsuperscript{22} It is thus, imperative for courts to recognize the normative-setting impact of enforcing license terms under the guise of contract principles where the result is actually driven by business or economic needs.

It may be useful at this point to explain what I mean by “actual” and “presumed” assent. I propose that the doctrinal concept of “assent” should be bifurcated into two parts, actual assent and presumed assent. Actual assent would require express agreement,

\begin{itemize}
  \item \textsuperscript{17} ARTHUR L. CORBIN, CONTRACTS § 128 (1963).
  \item \textsuperscript{18} See Robert L. Oakley, \textit{Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts}, 42 HOUS. L. REV. 1041 (2005) (stating that the U.S. standard of unconscionability is too high a bar to provide reasonable consumer protection and proposing minimum contract standards for non-negotiated contracts).
  \item \textsuperscript{19} The introduction of the term “contracts of adhesion,” into American jurisprudence is credited to Edwin Patterson when he described an insurance contract that an insured merely “adheres” to because he has little choice as to its terms. Patterson proposed that the law recognize the differences among contracts and argued that modifications to contract doctrine should be made for “contracts of adhesion, those in which a single will is exclusively predominant, acting as a unilateral will which dictates its law…” Edwin W. Patterson, \textit{The Delivery of a Life-Insurance Policy}, 33 HARV. L. REV. 198, 222 (1919).
  \item \textsuperscript{20} But see Epstein, supra note 10, at 206-07 (stating that a “convergence in terms across competitors,” should not be treated as collusion but as “evidence only of the imitation that allows successful practices to succeed while others fail.”).
  \item \textsuperscript{21} See Kessler, supra note 11, at 632 (stating that consumers’ ability to shop around for different contract is constrained by monopoly enjoyed by the drafting party).
\end{itemize}
not simply to the transaction, but to each of the individual material terms. Notice and an opportunity to read the agreement would not suffice; the licensee would need to manifest assent to a particular, disputed term, not just to the transaction and the idea of the contract. Presumed assent would require actual agreement to the transaction and the contract generally but not to any individual or particular contractual term. The contract may thus be formed with a finding of presumed assent, but presumed assent would not be interpreted as blanket consent to all the contractual terms. Whether a given term may be deemed part of the contract, and enforceable, would depend upon its operative effect. If the provision concerns the “scope of license” or the “terms of use” (as further defined) to the software or website, then those terms are enforceable (subject to the traditional contract law defenses) although the licensee’s obligation to perform is conditioned upon actual notice. The licensee’s right to use the digital information exists only as a result of the grant of license by the licensor; the scope of license describes the parameters of that right. The licensor, by structuring the agreement as one that is non-negotiable, has made a decision to create a business model based upon those license terms. The “scope of license” terms are the material terms of the transaction; the terms that the licensor believes are significant enough to warrant “deal breaker” status. The licensee has no rights to the intellectual property being licensed which preexist the license grant or exist independently of it.

On the other hand, the licensor should not be able to lump terms having nothing to do with the use of the product or service under the “Scope of License” or “Terms of Use”

---

22 See Patterson, supra note 19.
23 But cf. Lemley, supra note 7, at 481 (stating that courts should analyze the properly claim underlying electronic agreements directly rather than obscuring the issues in contract theory. Lemley states that to
provision. The substance of the provision, and not the caption or heading, is
determinative. The scope of license or terms of use include only those restrictions on the
licensee’s ability to use the product or service. Those restrictions, however, must directly
relate to, and arise out of, the license grant. If the operative effect of a term is to impose
any obligation upon the licensee unrelated to how the technology is being used, or if the
effect is to strip the licensee of any rights or remedies otherwise available to the licensee,
then the court should require actual assent to such term.

Often contained in non-negotiated licenses are “free-rider” provisions, included
in an agreement because the drafter has no incentive not to include them. Furthermore,
even if these provisions are deal-breakers for the licensor, the licensee has preexisting
interests that arise independent from the license grant that counterbalance the licensor’s
property interests. There is no reason for either party’s interests to outweigh the other
party’s. The term is not enforced simply because it is in the contract. The non-
enforcement of the term results in a gap in the contract. The courts should then refer to
the U.C.C. or to other applicable law to fill in any such gaps.

claim “that browsewraps are enforceable only where the drafter already had a right to prevent a particular
use is the functional equivalent of refusing to enforce those browsewraps.”)
24 Webster’s Dictionary defines a “free ride” as “something (as entertainment, acclaim, or a profit) obtained
without the usual cost or effort.” WEBSTER’S Ninth New Collegiate Dictionary (1987). I
adopt the Webster’s Dictionary definition of the term to describe “free rider” contractual provisions that are
included in a form agreement which are not consciously bargained for by the licensee or the licensor. I use
the term with a wink to its meaning in the law and economics literature, see, e.g., Mark A. Lemley,
obtaining a benefit from someone else’s investment); Lloyd Cohen, Holdouts and Free Riders, 20 J. Legal
the “Free Rider” Problem, 45 Econometrica 783 (1977) (describing the “Free Rider Problem” where
“the achievement of Pareto-optimal allocation of resources via decentralized methods in the presence of
public goods is fundamentally incompatible with individual incentives.”) Id. at 783.
25 See discussion infra Section II. See also Robert A. Hillman, Online Boilerplate: Would Mandatory
Website Disclosure of E-Standard Terms Backfire?, 104 Mich. L. Rev. 837, 842-45 (discussing whether
market pressure can discipline e-businesses’ selection of standard forms).
26 As of the writing of this Article, a draft of the Principles of the Law of Software Contracts is being
circulated by the American Law Institute. Presumably, a final adopted version would serve as an
I have divided this Article into two parts. Part I proposes a methodology for finding presumed assent that reconciles the business realities involved in software licensing with contract law principles. The proposed methodology first analyzes whether the putative licensee has assented and the nature of that assent (i.e., whether it is general assent to engage in a transaction or whether it manifests assent to the disputed term). The second step examines what terms govern the activity and determines enforceability according to the nature of the assent. Part II summarizes and analyzes the current case law using my proposed methodology. I suggest that often courts have contorted contract law doctrine to enforce terms that were never actually agreed to, but which nonetheless were commercially reasonable, as explained in Part I.

Admittedly, much of this Article and my proposal is generally applicable to form contracts that are contracts of adhesion;\(^\text{28}\) I choose to limit my discussion in this Article to licenses because, while the problem created by licenses to consumers is similar\(^\text{29}\) to that created by other types of consumer form agreements, the application of the solution

\[^{27}\text{In the absence of express legislative guidance or case law on a particular issue, the courts would resolve issues guided by the standard of reasonableness. Ian Ayres and Robert Gertner refer to this type of default allocation based upon reasonableness as a “majoritarian default rule.” See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87, 93 (1989). Craswell points out that majoritarian default rules are similar to liability rules, and that both are preferable where transaction costs to negotiate individual contracts are high. See Craswell, supra note 10, at 14. See also id. at 32-34 (discussing the problems related to pre-existing default rules).}\]

\[^{28}\text{For a discussion of the issues raised by form contracts that are contracts of adhesion, see Rakoff, supra note 13. I have previously discussed the disconcerting effects of applying interpretation rules to provisions in form contracts. See Nancy Kim, Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes, 84 NEB. L. REV. 506, 539-49 (2005).}\]

must be industry specific. In other words, the matter of to “what terms” we can presume assent would require consideration of the nature of the transaction and the business needs associated with that particular industry.

The primary advantage to the approach outlined in this Article is that it defaults to the U.C.C., other applicable law, and to ordinary (as opposed to industry specific) standards of reasonableness. By contrast, the current law governing non-negotiated licenses defaults to contract terms that are clearly biased in favor of the licensor. Shifting the burden created by the non-negotiated form of the contract accomplishes two important objectives. First, it eliminates free-rider provisions, which are those terms that do not affect the licensor’s decision to enter into the transaction. Those provisions that

---

30 But see Hillman & Rachlinski, supra note 29, at 432 (noting that “while e-commerce changes some of the dynamics of standard-form contracting in interesting and novel ways” these differences do not call for the development of a radically different legal regime.)

31 Using the U.C.C. as a “gap-filler,” does not include section 1-205 which incorporates trade usage where industry norms have been established through adhesion contracts. See discussion, infra, Section II.B.3.

32 Mueller has noted that “so much contractual language” is retained because of the feeling that it “can do no harm and might do some good.” Addison Mueller, Contracts of Frustration, 78 YALE L.J. 576, 580 n.22. (1969). This attitude is expressed by Michael Kinsley, the editor of the on-line magazine, Slate.com. When asked about the clickwrap agreement on the Slate.com website, Kinsley admitted, “Yes, it’s absurd.” But then added that it was no more absurd than agreements at other websites. See James Gleick, Click OK to Agree, www.around.com/agree.html (dated 1/29/2007). Lemley and McGowan have referred to adoption of standardized terms by industry players as a “network effect” of a sort – those who draft contracts of adhesion with one-sided terms benefit if their competitors adopt the same one-sided terms.” Mark A. Lemley & David McGowan, The Legal Implications of Network Economic Effects, 86 CAL. L. REV. 479, 589 (1998). See also Korobkin, supra note 13, at 1206 (describing free rider provisions as “socially inefficient”). Korobkin argues that the reason that form agreements require scrutiny is that buyers make decisions only in a “boundedly rational” manner, which provides incentives to sellers to draft non-salient contract terms to their own advantage, whether or not such terms are efficient. Id. The notion of bounded rationality was first espoused by Herbert Simon, a Nobel Prize winning economist who suggested that because human beings are limited in their computational abilities, they make choices that are satisfactory rather than optimal. Herbert Simon, A Behavioral Model of Rational Choice, 69 Q. J. ECON. 99, 99-100 (1955) (noting that the concept of “economic man” is in need of “fairly drastic revision” and the task is to “replace the global rationality of economic man with a kind of rational behavior that is compatible with the access to information and the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist.”). Simon further stated that because of the psychological limits of the organism, actual human rationality-striving can at best be an extremely crude and simplified approximation to the kind of global rationality that is implied, for example, by game-theoretical models. While the approximations that organisms employ may not be the best – even at the levels of computational complexity they are able to handle – it is probable that a great deal can be learned about possible mechanisms from an
are not free-riders, on the other hand, will require actual assent and will be called to the reader’s attention. A requirement of an affirmative manifestation of consent requires the consumer to consider whether the proposed transaction in fact is what he or she had bargained for. Forcing the consumer to click numerous times may be a hassle for the consumer, but if we are to take the notion of contractual assent seriously, it should be. 33 To do otherwise would be to privilege transaction facilitation 34 over the other objectives of contract law, namely enforcing the intent of the parties. Second, the resultant consumer frustration may motivate the customer to select another, less contractually demanding, licensor, or it may encourage licensors to streamline agreements and provide less onerous terms to avoid losing customers. 35 The consumer is forced to weigh the contractual provisions as part of his or her cost-benefit calculation in entering into the transaction. 36

---

33 In this Article, I am primarily concerned with which party should bear the burden of a failure to obtain actual assent. I do not address the issue of the type of liability that should attach where “proper” consent is lacking. Richard Craswell argues that property rules are preferable under any autonomy-based theory that attaches importance to a right-holder’s actual rather than hypothetical consent. Craswell, supra note 10, at 8. In many cases, however, Craswell states that a liability rule is preferable because the transaction costs of obtaining informed consent is too high. Id. at 11. Interestingly, in many software licensing cases, the failure to obtain proper consent would result in misuse by the non-consenting party. In any event, this Article is primarily concerned with the issue of what should constitute proper consent and who should bear the burden of the associated transaction costs in its obtaining. To the extent that I do address the consequences of a failure to obtain proper consent, I do so in my discussion of gapfillers in Section IV.

34 See Robert W. Gomulkiewicz & Mary L. Williamson, A Brief Defense of Mass Market Software License Agreements, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996). The authors argue that non-negotiated licenses are an efficient tool for standard, mass market transactions. Id. at 342-43.

35 Craswell states that if it is feasible for the drafting party to point out all the contractual clauses and explain them orally, her failure to do so should bar her from enforcing any clauses that were not so explained. Craswell, supra note 10, at 59. He acknowledges however that many contracts contain so many clauses that they could not all be orally explained prior to every sale. Id. Craswell thus recommends that in such cases, a liability rule should apply which would prevent the drafting party from enforcing only those obligations that were both not pointed out and deemed unreasonable by the court. Id. My proposal strives to obtain an alternative result, which is the streamlining of agreements, which would circumvent the need for imposition of liability rules but would, in most cases, achieve the same result by resorting to gap fillers. See Section II.B.

36 Hillman & Rachlinski, supra note 29, at 472, question whether “e-businesses will compete for customers with more advantageous contract terms” but notes that the Internet “might be producing some diversity in the contract terms e-businesses offer,” and that “comparison shopping among standard terms actually might
As it should be under the contract model, the contractual terms would more closely reflect what the parties have bargained for, thereby enhancing the economic efficiency of the exchange.37

My proposal is admittedly contrary38 to the current assumption under contract law that all provisions in a contract reflect the bargain or that manifested assent is tantamount to blanket assent39 to terms that are not “unreasonable.”40 I argue that a consumer’s assent to the transaction should not be transmuted into blanket assent to each individual term of a non-negotiated contract.41 A requirement of active assent to certain terms re-allocates the current balance of burdens away from the consumer to the party in the best position to accommodate it.42 As Friedrich Kessler wrote, “freedom of contract must pay off.”) Id. The authors speculate, however, that the diversity of terms “could be a product of the novelty of e-commerce and therefore might not persist as e-commerce develops.” Id.


38 Although my proposal is contrary to current contract law, it is not the first time an argument has been made in favor of actual assent. See, e.g., Clarke B. Whittier, The Restatement of Contracts and Mutual Assent, 17 CAL. L. REV. 441, 443 (1929) (critiquing the “objective” theory of contracts of the First Restatement and proposing that using “actual assent” as the basis for “mutual assent” except where there has been a “careless misleading which induces a reasonable belief in assent” would lead to better results).

39 Karl Llewellyn famously stated:

[The] instead of thinking about “assent” to boiler plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms…which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of the agreement.

K. LLEWELLYN, THE COMMON LAW TRADITION – DECIDING APPEALS 370 (1960). See also Hillman & Rachlinski, supra note 29, at 461 (defining Llewelyn’s notion of “blanket assent” as meaning that “although consumers do no read standard terms, so long as their formal presentation and substance are reasonable, consumers comprehend the existence of the terms and agree to be bound to them.”)

40 See also Hillman & Rachlinski, supra note 29 at 455 (noting that the current legal approach to standard form agreements supports Llewellyn’s view that the law should create “a presumption of assent (or “blanket assent”) to standard terms….Llewellyn based his framework on the perspective that, so long as the terms are not unfair in presentation or substance, courts should presume consumers’ “blanket assent” to the details they may have ignored.” Id.

41 See also Rakoff, supra note 13, at 1205-06 (criticizing Llewelyn for overlooking that boilerplate clauses often reflect the attorney’s “expertise” rather than the business person’s).

42 See also Recent Decisions, Limitations on Credit Card Holders’ Liability for Unauthorized Purchases, 13 STAN. L. REV. 150, 154 (1961) (stating that it may be proper to determine a credit card issuer’s liability
mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract." Vendors have been quick to take advantage of new modes of contracting to accommodate new types of products and services; it is time that they shared some of the costs associated with these forms of contracting as well.

I. The Problem of Assent and the Non-Negotiated License

Let’s say that you are downloading software from YOUCH, a social networking website. Before you can start the download process, a clickwrap agreement appears. In large lettering, a statement appears that you must click the “I AGREE” box in order to proceed. You click the “I AGREE” box without reading the terms contained in the electronic agreement. Are you bound by the terms of the clickwrap agreement? Assume further that one of the terms of the clickwrap agreement requires you to permit YOUCH to release your personal information to advertisers. Another provision prohibits you from installing software that blocks pop-up ads. Assume that a pop-up ad releases a virus that infects and deletes some of your files. Let’s assume further that desktop icons appear as a result of your use of YOUCH’s software. You try to delete those icons, and even to remove YOUCH’s software, but are unable to do so. You seek assistance from

by standards which would require it to bear a greater share of the risk of loss); Jane M. Rolling, The UCC under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses, 104 COM. L.J. 197, 228 (1999) (arguing that materials terms of a transaction should be available prior to purchase of software product).

Kessler, supra note 11, at 642.

See Deborah W. Post, Common Sense and Contracts Symposium: Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook, 16 TOURO L. REV. 1205, 1215-17 (2000) (querying why “the risk of poor management decisions” resulting in defective products should fall on the consumer rather than the management of the company).
YOUCH’s customer support, but are told that, pursuant to the terms of their clickwrap agreement, YOUCH is not responsible for any viruses caused by use of their website or their software. To make matters worse, you have just been informed by snickering acquaintances that your profile is being distributed by YOUCH to advertise their “Lonely Singles Meet Your Match” marketing campaign. Your grinning digital image along with a statement about your favorite songs, books, and foods are distributed far and wide by YOUCH’s marketers in the form of a jiggling pop-up box – a use which you ignorantly agreed to when you clicked the “I AGREE” box.

Far from being the product of this Author’s overactive imagination, such contract terms are common on networking websites, even if their enforceability has not yet been tested in a court of law. Generally, absent a finding of unconscionability, the terms of

---

45 Youch is a product of the author’s imagination.
46 See, e.g., the end user license on www.kazaa.com, which states:

Sharman reserves the right to run advertisements and promotions on Kazaa.... You agree that Sharman is not responsible or liable for any loss or damage of any sort incurred as the result of any such dealings or as the result of the presence of such advertisers on Kazaa and/or kazaa.com. You agree, so long as you have not entirely deleted Kazaa from your computer, not to take any action, including downloading other software, to disable or block the display of advertising by the Software.

See also the terms of use at www.myspace.com (stating that “MySpace.com takes no responsibility for third party advertisements which are posted on this MySpace Website or through the MySpace Services, nor does it take any responsibility for the goods or services provided by its advertisers. MySpace.com is not responsible for the conduct, whether online or offline, of any User of the MySpace Services. MySpace.com assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, any User or Member communication. MySpace.com is not responsible for any problems or technical malfunction of any telephone network or lines, computer online systems, servers or providers, computer equipment, software, failure of any email or players due to technical problems or traffic congestion on the Internet or on any of the MySpace Services or combination thereof, including any injury or damage to Users or to any person's computer related to or resulting from participation or downloading materials in connection with the MySpace Services. Under no circumstances shall MySpace.com be responsible for any loss or damage, including personal injury or death, resulting from use of the MySpace Services, attendance at a MySpace.com event, from any Content posted on or through the MySpace Services, or from the conduct of any Users of the MySpace Services, whether online or offline.”); www.friendster.com (“By publishing, displaying, or uploading (collectively, "Posting") any text, links, photos, video, messages, or other data or information (collectively, "Content") on or to the Website (including on or to your profile), you automatically grant, and you represent and warrant that you have the right to grant, to Friendster an irrevocable, perpetual, non-exclusive, fully paid, worldwide license to use, copy, perform, display, and
clickwrap licenses have been held to be enforceable. There are several problems with relying upon the doctrine of unconscionability to prevent enforcement of non-negotiated agreements. First, courts have generally been reluctant to strike down agreements on the basis of unconscionability provided that there has been notice and an opportunity to read the contract terms. In addition, the doctrine of unconscionability looks to industry norms to determine whether a term is enforceable, which may be problematic where the norms are set by the industry player with greater bargaining power. For example, consumers may not like the fact that their credit card companies charge them hefty finance charges but they lack an alternative. Credit card finance charges are not unconscionable because all credit card companies charge them.

There is another problem with employing the doctrine of unconscionability in the non-negotiated agreement context, and that is one that strikes at the integrity of contract doctrine. How can a consumer be deemed to have assented to terms that he or she did not read?

---

47 See discussion infra Section III.A.2.
48 See Blake Morant, The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses, 7 J. SMALL & EMERGING BUS. L. 233, 266 (2003); Amy J. Schmitz, Embracing Unconscionability’s Safety Net Function, 58 ALA L. REV. 73, 91 (2006) (stating that courts have become more formulaic in their application of the doctrine thereby undermining the doctrine’s “safety net” function). See also Larry DiMatteo & Bruce L. Rich, A Consent Theory of Unconscionability: An Empirical Study of Law in Action, 33 FLA. ST. U. L. REV. 1067 (2006) (conducting an empirical study of cases tending to show that claims of unconscionability are difficult, although not impossible, to win). Elsewhere, I have discussed the limitations of the unconscionability doctrine, including a high standard of unfairness, review of events limited to events existing at the time of contract formation, doctrinal vagueness, and judicial discretion. See Kim, supra note 28, at 550-53.
49 In response to consumer credit-related concerns, state governments have enacted special legislation that regulates the substantive content of credit contracts, as well as expands the disclosure requirements imposed upon creditors. See Jeffrey Davis, Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 VA. L. REV. 841 (1977).
50 Many scholars have also criticized the doctrine of unconscionability on the grounds that it undermines efficient business practices. See Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J. L. & ECON. 293, 294-95 (1975); Alan Schwartz, A Reexamination of Nonsubstantive Unconscionability, 63 VA. L. REV. 1387 (1983).
she never read. Even if the consumer was given an opportunity to read the terms, if the consumer never actually read them, there could not be actual assent to those terms. Unconscionability is a defense to contract enforcement, meaning that a contract must have already been formed. Contract law’s present insistence upon blanket assent means that if we wish to enforce any of the terms, we have to enforce all of the terms, provided that an applicable defense does not apply. In other words, if you had actually read the agreement, you might have agreed to the provision prohibiting you from using YOUCH’s website to market to its members; yet you might have been unwilling to agree to the use of your image in YOUCH’s advertisements. Yet if we want to enforce YOUCH’s right to prohibit your marketing activity on its website, we must also say that YOUCH has a right to use your image in its advertising. The only way for you to escape this situation would be if you could successfully use the unconscionability doctrine to defend against enforcement. But your use of the doctrine of unconscionability would likely fail if, for example, the practice of using member profiles in banner ads for social networking sites was commonplace; you were simply unaware of it because it was the first time that you had joined a social networking website.

---

51 But see Robert A. Hillman, Symposium: A Tribute to Professor Joseph M. Perillo: Rolling Contracts, 71 FORDHAM L. REV. 743, 743 (2002). Professor Hillman has stated that “[a]lthough courts and commentators focus on the time of contract formation, this analysis actually yields little fruit” because few parties think about this “technical question, so the issue has little real-world relevance.” Id. at 744. Furthermore, Hillman notes that “even if the time of contract formation is accessible, it does not tell us very much” because additional terms could be agreed to by the parties or barred by courts. Id.

52 For a discussion of consent generally, see Randy E. Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269 (1986); Richard Craswell, Contract Law, Default Rules and the Philosophy of Promising, 88 MICH. L. REV. 489 (1989). Some contract theorists view manifested assent to the transaction as actual assent. For example, Randy Barnett has stated that clicking an “I agree” icon demonstrates assent whether or not the terms that are being agreed to have been read. See Randy E. Barnett, Symposium: A Tribute to Professor Joseph M. Perillo: Consent ing to Form Contracts, 71 FORDHAM L. REV. 627, 635-36 (2002).
In this Section, I set forth my proposed methodology for analyzing non-negotiated software licenses. Part A provides a brief discussion of assent in contract law, and explains the concepts of actual assent and presumed assent. Part B focuses on the scope of presumed assent, and introduces a method of analysis that makes enforceability contingent upon the operative impact of a particular contractual term.

A. Actual Assent v. Presumed Assent.

One of the basic requirements for contract formation is mutual assent. Mutual assent has not been interpreted to mean agreement upon all the terms of a contract. Provided that the parties demonstrate mutual assent to the transaction, disagreement about the meaning of a particular term will not nullify its existence. The Restatement expressly distinguishes between terms that have been expressly agreed upon and those that are implied in law:

(1) A term of a promise or agreement is that portion of the intention or assent manifested which relates to a particular matter.
(2) A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the

---

53 Other commentators have suggested other approaches. Clayton P. Gillette, for example, has suggested that the issue of assent should be disregarded in the rolling contract situation. In its place, the presence (or absence) of representation by a third party should be used to serve roughly the same functions as assent. See generally, Clayton P. Gillette, Rolling Contracts as an Agency Problem, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION ECONOMY’ (EJane K. Winn ed., 2006). Michael Meyerson has stated that no new doctrine needs to be created for consumer form contracts. Expressly recognizing that consumers who sign form contract typically do not read them, he has suggested instead that the courts should focus on how a “reasonable drafter” should understand the assent of a customer rather than assuming objective agreement to all terms simply because the contract has been signed. See Michael I. Meyerson, The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts, 47 U. MIAMI L. REV. 1263, 1265-66 (1993).

54 For example, under the Restatement, contract formation requires a bargain in which there is both a “manifestation of mutual assent to the exchange” and consideration. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1978).
parties manifest an intention to create those relations.\textsuperscript{55}

The existing contract interpretation rules then govern how to determine the meaning of contract terms. For example, some courts will determine the meaning of a term in accordance with its ordinary usage or “plain meaning,”\textsuperscript{56} although many courts will examine such meaning in the light of circumstances existing at the time the contract was made.\textsuperscript{57} The relevant circumstances include course of dealing, course of performance, and trade usage.\textsuperscript{58} The courts will also look to the “reasonable expectations” of the parties in determining whether to enforce contractual terms.\textsuperscript{59}

1. Is software really different?

Software licenses occupy a unique place in the law because they raise both contract law issues and issues of proprietorship.\textsuperscript{60} While the type of agreement varies,
what all software licenses share is retention of ownership to the underlying intellectual property by the licensor and a product that is keenly susceptible to copyright infringement and misuse. Many commentators dispute that software is – or should be - licensed, not sold, notwithstanding the purported license agreement. Although the issue of whether software is in fact licensed and not sold is an important one, for the purposes of this Article, it is sufficient to acknowledge that the licensor has an interest in how the software and/or website information is being used because the use of such software and/or website information affects the licensor’s business. In particular, the reproducibility of software has the potential for economic damage to the licensor in a way that many other goods do not. Many courts, understanding the practical aspects and

\[\text{Tragedy of the Anticommons, 91 CAL. L. REV. 439 (2003); Mark A. Lemley, Place and Cyberspace, 91 CAL. L. REV. 439 (2003); Mark A. Lemley, Romantic Authorship and the Rhetoric of Property, 75 TEX. L. REV. 873; Shubha Ghosh, Deprivatizing Copyright, 54 CASE W. RES. L. REV. 387, 389 (2004). Lemley notes that the rise of the “property rights” view of intellectual property coincides with the widespread use of the term “intellectual property” instead of patent, copyright and/or trademark law, and suggests that the “rhetoric of property” may make it tempting to treat intellectual property as an absolute right to exclude. Lemley, supra note 24, at 1033-35, 1071. Setting aside the issue of whether intellectual property is the same as (or should be treated the same as) tangible property, I would like to focus on the proprietary interest the licensor has in the software as a product of the licensor’s business.}

\[\text{61 The Second Circuit in Specht v. Netscape Commc’n Corp., 306 F.3d 17 (2d Cir. 2002) noted that it is this manipulable quality that differentiates software from other goods: “Downloadable software...is scarcely a “tangible” good, and, in part because software may be obtained, copied, or transferred effortlessly at the stroke of a computer key, licensing of such Internet products has assumed a vast importance in recent years.” See also Raymond T. Nimmer, Issues in Licensing: An Introduction, 42 HOUS. L. REV. 941, 942 (2005) (describing conditional transactions as licenses).}

\[\text{62 See Thomas M.S. Hemnes, Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing, 71 DENV. U. L. REV. 577, 581 (1994) (stating that the retention of title in the licensor is a “legal fiction” and that “although the license purports to create a reversionary interest in the licensor at the termination of the license, few if any copies of licensed software are ever returned to their licensors.”); Lloyd L. Rich, Mass Market Software and the Shrinkwrap License, 23 COLO. LAW. 1321, 1322 (June 1994) (noting that because licensors typically do not retain title as a security interest, the license does not expire at a specified time, and the licensee does not make periodic payments, the shrinkwrap “license” is probably actually a sale). But see contra H. Ward Classen, Fundamentals of Software Licensing, IDEA 1, 5-6 (“the sale of software is typically not a “sale” within the meaning of the section 109 of the Copyright Act of 1976, but rather a license accompanied by a license agreement.”); Nimmer, supra note 62, at 941-42 (stating that licenses are a form of conditional transaction which is “by far” the most common type of transaction in information). The Seventh Circuit in ProCD, Inc. v. Zeidenberg expressly reserved the “license v. sale” discussion for “another day.” 96 F.3d 1447, at 1450 (7th Cir. 1996).}

\[\text{63 Of course, there are other products that are susceptible to unauthorized reproduction, most notably music CDs and cassettes and movie videos and DVDs.} \]
limitations of selling software, contort existing contract doctrine to enforce agreements that in other contexts would be unenforceable for lack of assent, or the existence of some voiding condition or circumstance, such as mistake. In so doing, however, the courts establish a precedent that applies to all types of non-negotiated contracts, including those having nothing to do with software.

My proposed methodology starts with the basic question: Does the license meet the technical requirements of contract formation? This seemingly simple and straightforward question has complex implications stemming from contract law’s failure to provide a middle ground between assent and lack of assent. A finding of assent leads to a finding of contract formation; on the other hand, a lack of assent means that no contract was formed. Not surprisingly, courts that wish to uphold a particular transaction or type of transaction have been more willing to find assent even in the absence of bargaining power. “Assent” has thus been construed to mean acquiescence rather than agreement. While one of the objectives of contract law is universally acknowledged as being the promotion of individual autonomy, “assent” is often stripped of any requirement of voluntariness or volition. While such a passive notion of assent seems inconsistent with the very reason why we enforce contracts, in fact, it reflects another of contract law’s goals, which is to encourage and facilitate economic

64 See, e.g., Specht, 306 F.3d 17 and ProCD, Inc., 86 F.3d 1447.
65 In the absence of a finding of mutual assent, the courts might yet find an implied-in-law, or quasi, contract. Quasi contracts, based in equity, are legal fictions imposed in order to prevent unjust enrichment. See Cascade v. Magrta, 225 N.W. 511, 512 (Mich. 1929); Kammer Asphalt Paving Co. v. East China Twp. Sch., 504 N.W.2d 635, 640 (Mich. 1993); Luithly v. Cavalier Corp., No. 98-5507, 1999 U.S. App. LEXIS 10653 at *12-14 (E.D. Tenn. May 20, 1999). In a transaction involving presumed assent, the parties intend to enter into the transaction with an awareness that it shall be governed by contractual terms, but does not actually assent to those terms.
66 See Karl N. Llewellyn, What Price Contract? - An Essay in Perspective, 40 YALE L. J. 704, 728 n.40 (1931) (stating that “[a]greement does not even today carry any connotation of real willingness. Acquiescence in the lesser evil is all that need be understood.”)
Contracts, while important in clarifying the terms of transactions, also stall their progression. Simplifying the contracting process – by discouraging or even preventing negotiations – thus shortens the time from transaction inception to completion. The transaction is thus streamlined by allowing assent to be found even where the contracting party did not have actual knowledge of a particular term. In actuality, if one did not know of a particular contractual term, one could not have assented to such term. In contract law, however, provided that the contracting party demonstrated assent to entering into the transaction, the courts have not much concerned themselves with whether the party had actual knowledge, and thus actually assented to, the contractual term at issue. Instead, the courts have focused on notice and an opportunity to read the relevant contractual terms.

Notice and an opportunity to read contractual terms are only somewhat helpful in establishing the existence of assent. While a rejection of those terms after notification does in fact establish non-consent to the terms, the opposite is not true. Where the consumer has no power to negotiate the terms, a failure to reject those terms does not

---

67 See Kessler, supra note 11, at 630 (noting that “freedom of contract” is both practical and moral). Kessler states:

[the individualism of our rules of contract law, of which freedom of contract is the most powerful symbol, is closely tied up with the ethics of free enterprise capitalism and the ideals of justice of a mobile society of small enterprisers, individual merchants and independent craftsmen…With the decline of the free enterprise system due to the innate trend of competitive capitalism towards monopoly, the meaning of contract has changed radically.

Id. at 640. Societal changes necessitate a dynamic approach to contract law. See generally, Melvin Aron Eisenberg, Symposium on Law in the Twentieth Century: The Emergence of Dynamic Contract Law, 88 CAL. L. REV. 1743, 1745 (2000) (describing dynamic contract law as first, effectuating the intent of the parties and then, applying the rules that a legislator would use, taking into account relevant policy considerations); Kim, supra note 28. While wealth redistribution is not considered one of the objectives of contract law, it is often considered to be one of the goals of the law more generally. See Eric A. Posner, Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract, 24 J. LEGAL STUD. 283 (1995).

Another generally accepted contract law objective is the protection of reasonable expectations. See Roscoe Pound, Individual Interests of Substance – Promised Advantages, 59 HARV. L. REV. 1, 1-2 (1945); Jane B. Baron, Gifts, Bargains, and Form, 64 IND. L.J. 155, 157, 190-201 (1989).
establish agreement or consent to the terms. This does not, however, mean that contractual terms should not be upheld where they are offered on a “take-it-or-leave-it” basis. In some cases, assent may be presumed because the term is one that the putative licensee would have agreed to if he or she had actually read it. Assent can be presumed either when the term is reasonable and unsurprising, or because it was a deal breaker term, so significant to the licensor’s business objectives that a refusal to accept the terms would have terminated the transaction. If the provision is one affecting the scope of the license, or the terms of use, it should be upheld provided that the licensee received notice. The licensee does not have an independent or preexisting right to use the intellectual property of the licensor. The licensor, furthermore, is not required to provide a license to the licensee, and certainly not on whatever terms the licensee chooses. A lack of actual assent should not, therefore, prevent contract formation because in many cases, assent can be presumed as long as there was notice and an opportunity to read the provisions. Assent, however, cannot be presumed in all cases, or with respect to all terms in a contract. A putative licensee might be presumed to have assented to certain terms, but not to others. In the next section, I will discuss which terms should be enforced in the absence of actual assent.

68 With shrinkwrap agreements, the courts have not even required an opportunity to read the contract terms prior to entering into the transaction. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).
69 These terms are discussed in greater detail in Part B, infra.
70 The license grant provision should be upheld as far as the contract analysis goes. There may, however, be other, non-contract law based, policy reasons for non-enforcement. For example, a court may decide not to enforce a license grant provision if the provision is held to be anticompetitive. Margaret Jane Radin has urged that policy arguments about information property take explicit cognizance of other policy considerations, namely contractual ordering, competition, and freedom of expression. Margaret J. Radin, Symposium: Cyberpersons, Propertization and Contract in the Information Culture; A Comment on Information Propertization and its Legal Milieu, 54 CLEV. ST. L. REV. 23 (2006). See also Michael J. Meurer, Copyright Law and Price Discrimination, 23 CARDOZO L. REV. 55, 102-08 (2002) (discussing the
B. The Operative Effect of Terms: Why it Matters

As explained above, if a party manifests actual assent to a contract, then that contractual term becomes part of the transaction. This section addresses what happens where a party manifests intent to enter into a transaction, but does not manifest assent to a particular term in the contract. Where parties dispute the meaning of a particular term, or have omitted it altogether, courts will often determine meaning by reference to trade usage and industry norms. Where control in a given industry is concentrated, there is often a systemic lack of bargaining power. Contract terms are imposed in a transaction by the party with greater bargaining power; these terms become duplicated and standardized within the industry. These terms thus evolve into standard terms in form contracts, offered on a take-it-or-leave-it basis, and representative of industry norms. This type of private legislation has occurred in many industries, including the insurance industry, the consumer credit industry, and in the subject of this article, the software industry. Given the systemic lack of bargaining power in the software industry, notice and/or an opportunity to read terms has little or no meaning – and does not mean that a party has acted either knowingly or willingly. On the other hand, the party has manifested a desire to participate in the transaction. Does that, however, mean that she or

---

71 For a critical view of the use of business norms, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996). Bernstein states that while the drafters of the U.C.C. sought to incorporate business norms in an effort to make commercial law more responsive to business realities, "they failed to recognize that this approach would fundamentally alter the very reality they sought to reflect, and would do so in ways that would have undesirable effects on commercial relationships and would undermine the Code's own stated goals of promoting flexibility in commercial transactions." *Id.*

72 See Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 316-19 (2003) (discussing how consumers acquiesce to licensing transactions because they effectively have no other way to purchase software given the evolution of the "licensing norm").

73 A systemic lack of bargaining power exists in other industries as well but I focus my discussion in this paper to the software industry and the unique issues that arise with respect to licenses.
he should be bound to all of its terms? Assume a consumer logs onto a website and clicks “I agree” without reading the multi-page electronic contract. Has the consumer agreed to those contract terms? Commonsense would tell us no. One could not agree to something that one has never read. Barring any unconscionable terms, however, the answer is likely Yes under existing law even though our hypothetical consumer could not have actually agreed to those contract terms if she never read them, even if she had the opportunity to do so.\(^\text{74}\) What the courts actually mean when they say the consumer has demonstrated assent is two things: (1) the consumer expressed a willingness to engage in the transaction; and (2) the consumer can be presumed to have agreed to the contract terms.

There was no actual agreement to those terms where the consumer has not actually read them. Contract law imputes agreement where there was an opportunity to read the contract and does not require actual assent. The assumption is that the consumer would have agreed to the terms because they are reasonable and/or because the consumer had no choice but to agree to them. This begs the question, What terms can the consumer be presumed to have assented to?

In reality, the above-described behavior on the part of the consumer is not so much an expression of intent to contract as it is a ceding to the reality of his or her situation – the consumer clicks without reading because he or she knows that it does not matter what the contract says. If the consumer wants to enter into the transaction, the consumer will accept all of its terms.

Libertarians might ask, so what?\textsuperscript{75} The consumer is a free agent, at liberty to visit another site. Nobody is forcing the consumer to purchase goods from this particular e-tailer, or use this website or software.\textsuperscript{76} But in fact, in many cases, due to the systemic bargaining imbalance within a particular market segment, the terms may have become so uniform and standardized that the consumer effectively has no choice.\textsuperscript{77} It is not a viable option for the consumer to decline the terms of any particular agreement since the terms are the same in the agreement offered by a competitor website. So, the consumer clicks away and hopes for the best.\textsuperscript{78}

This situation is quite different from the model contract scenario that is assumed by contract doctrine.\textsuperscript{79} Not only does one party lack bargaining power with respect to a particular transaction, but one class of parties lacks bargaining power within a given market sector. The party’s “assent” in such a case is void of volition and merely reflects a failure on the part of the consumer to resist market forces through self-deprivation. Where the available “good” involves necessities such as credit or insurance, this deprivation has very real social and economic consequences. Similarly, given the

\textsuperscript{75} As Joo keenly observes the use of “normal” human behavior as a standard “may promote libertarianism but it may also serves its nemesis, majoritarianism….Enforcing a contract in accord with the expectations of most people rewards conformist expectations and punishes nonconformist expectations.” Thomas W. Joo, \textit{Common Sense and Contract Law: Fear of a Normative Planet?}, 16 Touro L. Rev. 1037, 1047 (2000).

\textsuperscript{76} For a criticism of the “economic libertarian” view, see Posner, supra note 68. Eric Posner notes that the historical survival of usury laws responds to a basic social problem and that “those who endorse the policy of poverty reduction through the welfare system should support restrictive contract laws.” \textit{Id.} at 318.

\textsuperscript{77} See Mueller, supra note 32, at 580 (noting that consumers effectively have no choice in seeking variances to warranty disclaimers because “all competing goods” are “similarly limited.”)

\textsuperscript{78} See Scott J. Burnham, \textit{How to Read a Contract}, 45 Ariz. L. Rev. 133 (2002) (noting that consumers often click without reading); Hillman, \textit{supra} note 52, at 743 (noting the “widely accepted fact that, for a number of reasons, consumers typically do not read their standard forms.”)

\textsuperscript{79} Professor Addison Mueller noted two factors that together create the modern consumer’s lack of effective legal power:

\begin{itemize}
  \item First, there is an all-pervasive difficulty: our machinery of justice is simply not designed for easy use by the average citizen with a minor claim of any kind…[Second,] he claims in contract and must use a deck of doctrine that is stacked against him. Most of his losing cards are colored “freedom of contract.”
\end{itemize}
ubiquity of software and digitally-available information, it is highly unlikely that even the most ardent supporter of contractual autonomy would forego an ill-advised “click” on the basis of principle and an understanding of contract law alone. Instead, those of us who are aware of the consequences of doing so, click and cringe, and pray that whatever we have agreed to is either benign, unlikely to be enforced, or so horrible that it will be deemed unconscionable. A refusal to accept standardized contractual terms is simply unrealistic in many cases. Refusing to purchase software that is subject to the terms of a shrinkwrap agreement, or clicking “I Disagree” to electronic contracts containing objectionable terms is irrational and would force one to reject many of the benefits of technological advancements. The claim that such contracts are agreements reflective of free will is just plain fiction.

On the other hand, allowing a consumer or putative licensee to take advantage of the transaction and then reject the offered terms also presents problems. The licensor is not obligated to provide any products or services, and has a right to determine how much risk it will assume in order to engage in business. The calculation of that risk is often reflected in the contractual terms, such as the licensor’s limited warranty and limitation of liability. The licensor may wish to offer the product, but only with some restrictions on the licensee’s use. The licensor continues to own the intellectual property embodied in the software and likely wishes to restrict how the licensee will use it. The readily manipulable nature of digital information and the ease with which the licensor’s business objections can be subverted makes the licensor’s desire for specific license terms or terms of use understandable. Courts, sympathetic to the licensor’s plight, have tended to

Addison Mueller, supra note 32, at 578-79.
enforce licenses under contract law, finding mutual assent provided there was a reasonable opportunity to review the terms. But, as discussed above, such an opportunity is hollow if it provides no option for the consumer to negotiate other than to decline to enter into the transaction altogether. This does not mean that the licensor should bear the burden of the consumer’s refusal to read contractual terms; nor should it mean, as it has in the past, that the consumer should bear the burden of ferreting out onerous terms in a multi-page contract even if given the opportunity to do so. What it does mean is that if the licensor wishes to impose certain onerous terms upon the licensee, the licensor must receive the licensee’s actual assent to those terms. This shifts the burden of establishing contractual terms on the party in the best position to bear it—the party with greater bargaining power.

Some may wonder, what difference does the requirement of actual assent make if the consumer effectively has no choice given the prevalence of onerous terms in standard form contract for similar products/services? The additional transaction impediments required to manifest actual assent does slow down the contracting process, but that is an inconvenience that affects both parties. The current accepted form of non-negotiated contracts now burdens only the consumer, and offers no incentive to the licensor to offer streamlined agreements or reasonable terms. On the contrary, judicial deference to

---

80 It is perhaps unsurprising that, as Mark Lemley notes, “virtually all the courts that have enforced browsewrap licenses have done so against a commercial entity, generally one that competes with the drafter of the license.” See Lemley, supra note 7, at 459.
81 In ProCD, Inc. v. Zeidenberg, the Seventh Circuit did not even require review of terms prior to purchase but merely an opportunity to return the purchased item after review of the shrinkwrap license. See discussion infra Part II.
82 Korobkin, for example, states that notice of a provision does not necessarily render it salient: “‘Notice’ is a prerequisite of salience, but notice is not a sufficient condition of salience.” Korobkin, supra note 13, at 1234.
83 See Jeff Sovern, Towards a New Model of Consumer Protection: The Problem of Inflated Transactions Costs, 47 WM. & MARY L. REV. (2006); but cf Hillman Rachlinski, supra note 29, at 472-75 (discussing
licensors’ legitimate business concerns has resulted in the licensors taking greedy advantage of consumers’ lack of power by imposing multi-page terms that are accepted by a simple click. Robert Hillman has conducted an empirical study that suggests that requiring advance disclosure of website terms will likely fail to increase consumers actually reading such terms. He acknowledges that while requiring methods of attracting attention, “such as requiring bold text or clicking after each term on the screen (or both), might increase reading,…analogous strategies in the paper world have had mixed results, probably in part because consumers, worn down by the contracting process, are unlikely to be riveted to attention by such formalities.” Yet Internet transactions are different from real world transaction in significant ways. First, the real world consumer has expended more effort in reaching a retail location. The consumer has spent time and money on gas and parking. Searching for alternative vendors also takes much more effort. In the same way that price comparison shopping is much easier

---

84 Robert Oakley explains how license agreements evolved with technology:

Standard form contracts became an issue in the consumer technology context when computers evolved from being essentially a business commodity….to being a consumer commodity….In such an environment, it was no longer possible to have a negotiated contract between the seller and each and every customer. There was also considerable uncertainty at the time about the scope of copyright protection for computer software….In an innovative experiment and with great uncertainty about their validity, these contracts began to take the form of shrinkwrap licenses…Over the years as the technology evolved, the licenses have evolved along with it to include so-called clickwrap licenses. Browsewrap licenses were added as the Internet developed with its ability to create hyperlinks that would take a customer to a license agreement at another location.

Oakley, supra note 18, at 1048-; see also Gomulkiewicz & Williamson, supra note 34(arguing that mass-market end user license agreements provide substantial benefits for distributing information products, are efficient for mass market distribution, informative for end users, and enable software publishers commercial flexibility). Id. at 341-53.

85 Robert A. Hillman, supra note 25, at 839-40 (“[E]-consumers may still have ample rational reasons for not reading and cognitive processes that deter reading and processing terms.”)

86 Id. at 844.
on the Internet than running from shop to shop at the local mall, so is it easier to move from website to website, not necessarily in order to review contract terms but to discover which websites offer a more pleasant experience. Website marketers are very aware of the benefits of making transactions as seamless as possible. In the same way that a consumer is more likely to return to a shopping site that processes transactions with “one-click,” so too, might that same consumer refuse to return to a site that requires numerous clicks to approve onerous legal terms. My proposal contemplates a change, not just to the substantive terms of licenses, but to the mechanism by which assent may be demonstrated. Because it affects the consumer experience, it is more likely to have an impact on consumer loyalty. Standard form agreements thus become competitive factors in more than a purely rhetorical sense. To require multiple clicks burdens the consumers, but it also burdens the licensor. The transactional hurdles would likely result in real costs to the licensor in terms of aborted transactions and timed-out web exchanges, thus providing an incentive to the licensor to rethink its contractual offerings.

While limiting presumed assent to license grant or scope of use provisions may be simple in theory, many licensors may simply attempt to cram more terms and conditions

---

87 See Cheryl Lu-Lien Tan, Haggling 2.0, W.S.J., June 23-24, 2007 (reporting that “search engines and fashion sites listing retailer discount codes make it easier than ever” for consumers to comparison shop and even bargain for better prices on the Internet).

88 See also Robert W. Gomulkiewicz, Getting Serious About User-friendly Mass Market Licensing for Software, 12 GEO. MASON L. REV. 687, 695-96 (2004) (setting forth reasons why software publishers should care about better written end user agreements, including building good will with customers).

89 To the claim that standard form contracts are unconscionable is often the response that consumers are free to shop elsewhere for better terms. In reality, consumers are unlikely to compare several different multi-page agreements for reasons exhaustively discussed elsewhere. See sources cited supra note 60.

90 Id. at 844.

91 Korobkin claims that “negative reputational consequences of inefficient non-salient form terms are unlikely to discipline sellers to offer efficient terms.” Korobkin, supra note 13, at 1240, and 1246-48. While this may be true in certain real-world transaction, this is less likely to be true where the negative reputational consequence is combined with annoying transactional obstacles.
in paragraphs captioned “License Grant” or “Scope of Use.” Implementing the proposed methodology thus requires that the operative effect of the provision – rather than its caption – determines whether actual or presumed assent is required. Generally, terms that restrict the licensee’s use of the intellectual property would require only presumed assent. The terms of use would then be enforceable provided that traditional contract defenses did not apply. In other words, lack of actual assent to license grant provisions or terms of use would not prevent contract formation even though traditional contract law defenses may still bar enforcement of those terms. On the other hand, terms unrelated to use of the software or website that impose an affirmative obligation on the licensee or which require the licensee to relinquish otherwise existent rights would require actual assent. These two categories of terms are discussed below.


If the relevant contractual term imposes an affirmative obligation that is not directly related to the use of the licensor’s intellectual property, the licensor should be required to show that the licensee actually assented to that particular term. Let us return to the hypothetical presented at the beginning of this Article where you wish to download software from YOUCH’s website. In order to start the download process, you must accept the terms of an electronic contract. You have clicked on the “I accept” button but did not read the terms of the contract. Your clicking expresses your assent to enter into the transaction, but not your actual assent to the individual contractual terms. Is the provision prohibiting you from deleting those pesky desktop icons enforceable? Under the blanket assent theory of consent because you have manifested assent to the
transaction, it is likely that the provision would be held enforceable unless it were unconscionable. An unconscionability analysis would examine whether that term was unreasonably favorable to YOUCH, and whether you had a “meaningful choice” regarding whether or not to enter into the transaction. Let us pretend that the software is being provided to users at no charge. Using this test for unconscionability, there is a strong possibility that the provisions would be upheld. You are not required to download the optional software and you are free to join other networking sites that do not have this requirement. The term, while favorable to YOUCH, is not unreasonable especially if the software is being provided for free. The clause whereby you unwittingly consented to advertise YOUCH’s singles matching services, while surprising to you, is not particularly oppressive or shocking particularly since you are free to go elsewhere and had an opportunity to review the terms of the agreement prior to acceptance. In fact, many YOUCH members might be delighted by the prospect of greater distribution which increases their odds of finding a suitable match. Yet the result is wrong. One could argue that the provision in question is contrary to industry norms and defeats the “reasonable expectations” of the parties. Yet, what are the reasonable expectations of the parties with respect to a practice that is novel, i.e. the giving away of software in exchange for permission to use the customer in advertising? The argument regarding reasonable expectations and industry norms carries some weight only as long as the practice is novel. If other companies determine that this method is an effective marketing tool, then it could quickly become an industry norm, as one-sided as this norm may be.92 An establishment

---

92 See also id. at 1271 (noting that “if reasonable expectations are defined by prevailing custom…the doctrine could entrench and perpetuate inefficient low-quality terms that become commonplace because they are non-salient to most buyers.”)
of an industry norm would then defeat any claims of subsequent consumers that the provision was an unfair surprise, or defeated their reasonable expectations.

Under my proposed methodology, your assent to the terms of the contract can be presumed with respect to those terms that restrict your ability to use YOUCH’s software and/or its website. Your assent would not be presumed, however, with respect to terms that impose an affirmative obligation not directly related to your use of YOUCH’s website nor would your assent be presumed with respect to any provisions that deprive you of a legal right (i.e. your right to control the use of your personal information). Terms that impose affirmative obligations would require express consent. In our hypothetical, your assent to the license grant would be presumed, but not to the others terms. Your failure to read the provisions of the contract would not prevent contract formation, but it would affect whether a particular provision becomes a binding part of that contract. This does not, however, mean that YOUCH would never be able to enforce a contract containing an agreement on the part of the licensee to participate in advertising campaigns. In order for such a provision to be enforceable, YOUCH would need the licensee’s express consent. YOUCH could obtain such consent, for example, by requiring the consumer to “initial” the marketing provision – this could take the form of an electronic click immediately following the provision.

It would be more complicated to obtain actual assent to a term in a shrinkwrap agreement that does not pertain to the scope of the license – and it should be. The licensor should not be able to foist obligations not directly related to the scope of the license upon the licensee without the licensee’s actual consent. Thus, provisions that do not restrict the licensee’s use of the software contained in shrinkwrap agreements would
be *per se* unenforceable unless the consumer was asked to initial such terms at the time of purchase – in the same way that consumers currently are asked to initial individual provisions of car rental agreements or other important, but not intuitive, provisions in other types of form agreements. This requirement of actual assent would shift the burden that currently exists on the consumer to sift out the onerous provisions onto the party better situated to do so – the contract drafter. The contract drafter is in the best position to point out the material terms and draw them to the licensee’s attention. This may slow down the transaction, but the result would burden both parties; currently, the burden of non-negotiated contracts is borne by only the consumer.

Shifting the burden of affirmative obligation provisions from the consumer/putative licensee to the contract drafter accomplishes two important objectives. First, it encourages economic efficiency in transactions by eliminating free-rider provisions. Such provisions are included in non-negotiated contracts even though their presence or absence would not affect either party’s decisions to enter into the transaction. Often their inclusion in contracts reflects a surfeit of caution, an obsessive desire for no-additional-cost complete legal coverage, or simply reflects boilerplate carried over from a prior form agreement. Those provisions that are not free-riders, on the other hand, will be called to the reader’s attention and will remain in the contract. Contract drafters faced with the requirement of calling out affirmative obligation provisions will either conform their contracts, if the provision is considered important enough (i.e. if it is part of what is being bargained for), or they will drop the provision as unnecessary, thus streamlining and facilitating the contracting process. Consumers, too, will gain from this requirement. Currently, the overwhelming verbiage presented in form agreements makes it difficult to
distinguish innocuous provisions from those requiring more scrutiny and contemplation. A requirement of manifestation of consent to an affirmative obligation term attracts the consumer’s attention and requires the consumer to consider whether the proposed transaction in fact is what she or he had bargained for. If the answer is yes, the consumer will proceed to click, I AGREE. If the answer is no, he or she will click, I DON’T AGREE. The consumer faced with such a decision may not be enthusiastic about the available options, but at least he or she is made aware of the consequences of engaging in the transaction. The act of assenting forces the consumer to acknowledge the existence of a particular term. The affirmative obligation provision then becomes part of what is bargained for, and is weighed in the consumer’s cost-benefit calculation. The resulting agreement thus more accurately reflects what both parties wanted and encourages the efficiency of the transaction. Currently the assumption under contract law is that all provisions in a contract reflect the bargain. This assumption does not reflect the reality where non-negotiated contracts are involved. A consumer may want a particular good or service, but not the ancillary provisions that he or she may not have bothered to read. The court thus transmogrifies the consumer’s assent to the transaction into a blanket assent to the terms of the contract, most of which have not even been read. This does not mean that the consumer should be permitted to set the terms of the bargain nor that a consumer should be allowed to pick and choose the provisions at his or her sole discretion. What it

---

93 Richard Epstein, on the other hand, argues that those who are less knowledgeable are able to “rely, often to free-ride, on the wisdom of their betters to achieve the terms that make for successful contracting.” Epstein, supra, note 10, at 206. But as Clayton Gillette points out, in many cases, there are divergent interests among buyers. See Clayton P. Gillette, Rolling Contracts as an Agency Problem, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION ECONOMY’, supra note 54, at 250-53. See also Meyerson, supra note 54, at 1270-71 (expressing skepticism that there exists a “small cadre of type-A consumers” that ferrets out beneficial terms to the benefit of the non-reading majority of consumers.)
does mean is that the contract drafter should not be able to get more than what he or she bargained for.

A requirement of actual assent to terms that impose an affirmative obligation upon the consumer provides an incentive to the contract drafter to streamline the contracting process. The licensor risks losing business or harming its reputation by putting forth onerous terms that will require the putative licensee’s acknowledgement and active consent. The Internet, itself, may facilitate consumer action. Consumers can easily send unhappy e-mails to licensors. Individuals can share and disseminate information by posting comments in blogs and consumer-oriented websites ridiculing onerous clickwrap terms. Such a requirement forces both parties to consider the importance of such terms in the context of the transaction as a whole; more importantly, it forces each party to acknowledge that the other party recognizes and accepts the importance of such term. For the putative licensee, it indicates that the particular term is not just harmless boilerplate that will never be implemented or enforced by the licensor. Currently, many consumers simply ignore contractual terms and hope for the best. The

---

94 There is some evidence that streamlining contractual terms promotes consumer reading and understanding. See Davis, supra note 50. Davis conducted an empirical study examining the impact of simplified disclosure terms in consumer credit agreements. He concluded that “[r]equired disclosure undoubtedly can play an important role in protecting consumers. But to be useful, important information must be available in documents free of needless clutter.” Id. at 906. He adds that consumer-credit contracts should contain “only those clauses essential to the buyer-seller relationship.” Id.

95 See Hillman & Rachlinski, supra note 29, at 470 (noting that the “intense focus on reputation created by the e-business environment diminishes the likelihood that e-businesses will offer inefficient terms in their standard forms.) The authors caution that because of the availability of information on the Internet, “e-businesses must be careful about the content of their boilerplate, or at least might refrain from enforcing some of it.”) Id.

96 Id. at 471 (observing that the availability of Internet research will “have a greater effect on e-businesses than on conventional businesses).

97 Some websites have responded to such complaints by modifying their license terms. For example, Fark.com recently revised their terms of use after users complained about the terms on BoingBoing, another website. See http://www.boingboing.net/2007/04/26/farks_copyright_poli.html. See also http://boingboing.net/2006/07/20/youtubes_newpolicy_.html. Thanks to Fred von Lohmann for posting about this issue to the cyperprof listserv. CD Baby recently overhauled its clickwrap agreement, apparently in response to complaints from potential users about the overwhelming legalese. E-mail on file with author.
minimal and, in the case of browsewraps, non-existent, transactional obstacles facilitate the consumer’s ignorance. A requirement of active assent makes it harder to play ostrich. The repeated indignity of forced assent to unreasonable terms may, in turn, result in collective action by consumers. Even if it does not, heightened awareness of a party to a contract is in and of itself socially beneficial. Furthermore, such a requirement reallocates the current balance of burdens away from the consumer to the party in the best position to accommodate it.

2. Provisions that Take Away Legal Rights

Contractual provisions that diminish the consumer’s legal rights should also be subject to the standard of actual assent. Because such rights exist independently from the consumer’s right to use the software or other licensed product, the licensee cannot be presumed to have relinquished them. I use the term “right” loosely here to include privileges otherwise available to the licensee that do not derive from or arise out of the license grant. Examples of provisions restricting or diminishing rights include those compelling arbitration in the event of a dispute and provisions limiting the choice of forum. Currently, such provisions are standard in many non-negotiated software

---

98 See Hillman & Rachlinski, supra note 29, at 441 (“Consumers concerned about the possibility of exploitation can try to avoid terms they consider exploitative and refuse to transact with businesses that have reputations for offering and enforcing manipulative contract terms. In addition, the aggregate decisions of many consumers can pressure businesses into providing an efficient set of contract terms in their standard forms.”) Id. at 441-42.

99 See also Lemley, supra note 5, at 1264 (stating that as a matter of policy “unbargained shrinkwrap license provisions that reduce or eliminate the rights granted to licensees by the federal intellectual property law” should not be enforced).

100 Korobkin provides additional support for why such provisions should require actual assent: “If buyers believe that personal safety or the right to seek redress of legal wrongs in a court of law are entitlements that should be inalienable and not subject to commodification, explicitly trading off these types of entitlements against a product’s price and physical features might create elevated stress levels.” Korobkin, supra note 13, at 1231. He notes that buyers often cope with the stress of emotion-laden choices by ignoring such terms and rendering them non-salient. Id. at 1231-32.
licenses. Many commentators state that such provisions are essential to the drafting party. For example, some scholars argue that the provision eliminating the licensee’s right of first sale under the Copyright Act is necessary to protect the licensor’s intellectual property rights. While many critics have questioned the validity of such arguments on substantive grounds, the focus of this Article is on the process by which such provisions are incorporated into agreements. A consumer may be unaware that he or she has abdicated certain rights or privileges by entering into the transaction. Even if such provisions are not contrary to public policy or otherwise invalid, agreement to

101 Judith Resnik has noted that increasingly alternative dispute resolution or dispute resolution dominate (and supplant) the adjudicatory process. See generally, Judith Resnik, Procedure as Contract, 80 NOTRE DAME L. REV. 593, 619-22 (2005).

102 See Gomulkiewicz & Williamson, supra note 34, at 353-61 (stating that software publishers restrict rights associated with first sale, such as decompilation, reverse engineering, and disassembly, because they risk exposing the secrets contained in the software’s source code.); Mark I. Koffsky, Note, Patent Preemption of Computer Software Contracts Restricting Reverse Engineering: The Last Stand?, 95 COLUM. L. REV. 1160, 1160-61 (claiming that contracts that restrict reverse engineering may become the “primary method” for software creators to deter such activity). The recent enactment of the Digital Millennium Act is likely to alleviate such concerns. Section 1201 of the Digital Millennium Copyright Act of 1998 proscribes devices that are primarily designed to circumvent technological devices intended to protect against unauthorized copying. See Madison, supra note 73, at 287-90 (discussing how the anti-circumvention provisions of the DMCA operates as a form of licensing to restrict user’s rights); Peter Moore, Note, Steal This Disk: Copy Protection, Consumers’ Rights, and the Digital Millenium Copyright Act, 97 NW. U. L. REV. 1437, 1440-41, 1445-48 (2003) (arguing that the first sale doctrine and archival use are in danger of becoming moot due to the DMCA).

103 See, e.g., Hennes, supra note 63, at 577-81 (discussing historical reasons why software is licensed). Hennes concludes that although “[o]riginally justified by the necessity of protecting software as a trade secret, software licensing now appears to be both unnecessary…and inconsistent with the general right of alienation that appears in the common law, the Copyright Act, patent law, the Bankruptcy Code and the Uniform Commercial Code.” Id. at 599. See also Madison, supra note 73, at 281-82, 289 (discussing how first sale rights are restricted by software licenses and the DMCA).

104 As Friedrich Kessler noted:

freedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system....The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable – the standard mass contract....The individuality of the parties which so frequently gave color to the old type contract has disappeared. The stereotyped contract of today reflects the impersonality of the market.

Kessler, supra note 9, at 630-31.

105 While many critics have questioned the legitimacy and validity of such claims on substantive grounds, the focus of this Article is on the validity of the process by which such provisions are incorporated into contracts.
their terms should not be presumed but actively sought.\textsuperscript{106} Non-negotiated standard form contracts, by their very nature, assume passive acceptance by the consumer. While there are numerous arguments for such contracts, acceptance of their \textit{form} should not mean wholesale acceptance of their terms. A requirement of affirmative assent merely shifts the presumption that currently exists in favor of the party without control in structuring the transaction. Instead of presuming acceptance, the presumption is that such terms are \textit{not} part of the transaction. The burden is thus on the contract drafter to prove acceptance of these particular terms by the consumer. The terms may still be offered on a “take-it-or-leave-it” basis; however, it will require a little more effort on the part of the contract drafter, and a lot more willful blindness on the part of the consumer, to do so.

\textbf{3. Using U.C.C. Article 2 as default terms.}

Much disagreement exists regarding whether software is or should be licensed or sold, and consequently, whether the U.C.C. governs software transactions.\textsuperscript{107} I advocate

\textsuperscript{106} Resnik notes that “[a]pects of privately-based dispute resolution are now melded with public processes as the state itself embraces private dispute resolution for a wide array of conflicts brought to its courts and puts judges in the job of trying to resolve disputes through contracts.” Resnik, \textit{supra} note 102, at 622-23. The enhanced likelihood that a judge will defer to contractual terms in determining procedural matters only highlights the necessity of ensuring that there was actual consent to those contractual terms. Resnik proposes that “[i]n light of the legal ability to use settlement contracts as vehicles to generate court enforcement, courts should refuse to sanction certain kinds of bargains.” \textit{Id.} at 599. Examples of such bargains include “most favored nations’ clauses,” and limitations of parties’ capacity to bargain for sealed records. \textit{Id.} at 650.

\textsuperscript{107} See sources cited \textit{supra} note 61. In many transactions with consumers, there is a sale of the medium (i.e. the CD) upon which the software or other digital information is loaded, but retention of ownership by the licensor to the underlying program and the copyright thereto. \textit{See} Madison, \textit{supra} note 73, at 297-99; Nimmer, \textit{supra} note 62, at 942 (referring to licenses and leases as conditional transactions where the primary feature is that one party “retains the right in law to control the other party’s use of the information in various ways, while the other party receives only limited privileges or rights in the information.”). Nimmer contends that software is not a “good” and therefore, should not be governed by Article 2 of the U.C.C. at all. \textit{See} Raymond T. Nimmer, \textit{Symposium on Intellectual Property, Digital Technology \\ Electronic Commerce: The Uniform Commercial Information Transactions Act and Electronic Commerce: Licensing in the Contemporary Information Economy, 8 WASH. U. J.L. \\ & POL’Y 99} (stating that “the software and digital information industries do not deal in goods any more than the motion picture industry deals in celluloid tapes.”) \textit{Id.} at 113. Nimmer promotes UCITA as a “separate body of contract law applicable to transactions in computer information.” \textit{Id.} at 116. The issue of whether software is a “good,” a “service,” or something else entirely, while an important one, is not to be resolved in this Article.
looking to the U.C.C. as a source of guiding principles with respect to consumer transactions, regardless of whether software is categorized as goods or services, or something else.  

Any gaps in the contract created by the non-enforcement of terms requiring actual assent should be filled using the U.C.C. Article 2 governing the sale of goods with two notable exceptions. My proposal precludes – indeed supplants – U.C.C. section 2-207. In addition, U.C.C. section 1-205 would not be applicable. That section provides as follows:

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) ... Any usage of trade in the vocation or trade in which (the parties) are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

As discussed in Section I, in an industry governed by contracts of adhesion, the creation of industry “standards” does not reflect mutually agreed terms. This does not mean that such terms would never be included as part of a contract; it does, however, mean that in order to so include them actual --and not presumed – assent would be required.

---

108 See Lon L. Fuller & Melvin A. Eisenberg, BASIC CONTRACT LAW 73 (2006) (“...it should be borne in mind that even where a UCC provision is not directly applicable to a transaction – for example, where the provision is in Article 2 and the transaction involves services – the principle embodied in the provision may be applicable, so that the provision may serve as a source of law”). See also Daniel E. Murray, The Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 FORDHAM L. REV. 447, 448 (1971) (describing American courts as “almost zealous in extending the reach of Article 2 to non-sales areas”).
II. Making Sense of Non-negotiated Software Licenses.

This Section applies my proposed methodology in two different ways. Part A analyzes the current case law addressing issues raised by non-negotiated licenses and discusses how the disparate court opinions may be reconciled under the methodology set forth in Part I. Part B examines a sample software license agreement and reviews how certain common contract provisions might fare using the proposed approach.

A. An Overview of the Law Governing Non-negotiated Licenses

Software licenses are usually categorized as negotiated or non-negotiated. Non-negotiated agreements typically include shrinkwrap, browsewrap, and clickwrap licenses. The form of these licenses evolved to accommodate the form of the product that was being licensed and the perceived need for protection. As technology enabled different venues or applications, the form of the licenses adapted to these changes.\(^{110}\)

This Section examines the current law pertaining to each of these types of licenses.\(^{111}\)

1. Shrinkwrap licenses.

Does a customer enter into a contract when he or she unwraps a software package? The first courts to address the issue of shrinkwrap agreements\(^ {112}\) concluded in the

---

\(^{109}\) As Epstein points out, section 2-207 is “an unfit model to carry over to the licenses of software and computer information technology, whether or not these are covered under the sale of goods provisions of the UCC.” See Epstein, supra note 10, at 216.

\(^{110}\) See Oakley, supra note 18, at 1048-54.

\(^{111}\) This section offers only a cursory overview of the law governing shrinkwraps, clickwraps and browsewraps because this territory has been well-trodden by other scholars. See, e.g., Michael H. Dessent, Digital Handshakes in Cyberspace Under E-Sign: “There’s a New Sheriff in Town!”, 35 U. RICH. L. REV. 943, 949-91 (2002); Joo, supra note 76; Lemley USC Article.

\(^{112}\) A shrinkwrap license is an example of a “rolling contract.” In a rolling contract situation, the customer orders and pays for the goods before having an opportunity to review the contract terms, which are included with the product. See Hillman, supra note 52, at 744.
negative. In *Step-Saver v. Wyse Technology*, the Third Circuit held that a “box-top” license was invalid under the Uniform Commercial Code. The Court determined that the contract for the sale of the software product was made when the product was purchased; therefore, any terms contained in the shrinkwrap were merely unaccepted “proposals for modification,” under U.C.C. Section 2-207 and not a conditional acceptance by the software producer. In other words, the consumer never assented to the terms of the shrinkwrap agreement. The Fifth Circuit in *Vault Corp. v. Quaid Software, Ltd.* stated that a shrinkwrap license was unenforceable because it touched upon federal copyright law and was therefore preempted.

In 1996, however, the Seventh Circuit in the landmark case of *ProCD, Inc. v. Zeidenberg*, concluded that “[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).” The plaintiff, ProCD, compiled information from over 3,000 telephone directories into a computer database. It sold a version of the database, called Selectphone, on compact discs. The plaintiff claimed that the database cost more than ten million dollars to compile and additional resources to maintain. ProCD sold its database to the general public for personal use at

---

113 939 F.3d 91 (3d Cir. 1991).
114 *Id.*
115 *Id.* at 98.
116 *Id.* at 102-03.
117 847 F.2d 255 (5th Cir. 1988).
118 *Id.* at 270.
119 86 F.3d 1447 (7th Cir. 1996).
120 *Id.* at 1449.
121 The court assumed that the database could not be copyrighted. *Id.* at 1449.
122 *Id.* at 1449.
123 *Id.*
a significantly lower price than it did to manufacturers and retailers.\textsuperscript{124} The court discussed ProCD’s price discrimination policy and the financial benefits to consumers.\textsuperscript{125} It stated that rather than tailoring the product to suit a particular user,\textsuperscript{126} ProCD decided to contractually bind its customers to its price discrimination policy.\textsuperscript{127} The outside of each box stated that the software was subject to enclosed license terms. The license, which limited use of the program to non-commercial purposes, was contained in the user’s manual and appeared on the user’s screen every time the software was run. The defendant, Matthew Zeidenberg, purchased a consumer package of SelectPhone and formed a company to resell the information contained in the database on the Internet for a price that was less than what ProCD charged its commercial customers.\textsuperscript{128} Zeidenberg argued that ProCD made an offer by placing the software in stores.\textsuperscript{129} He stated, and the district court agreed, that he “accepted” the offer by purchasing the software.\textsuperscript{130} The

\textsuperscript{124} Id.

\textsuperscript{125} The court stated that

\[\text{[i]f ProCD has to recover all of its costs and make a profit by charging a single price – that is, if it could not charge more to commercial users than to the general public – it would have to raise the price substantially over $150 (the retail price for the general public). The ensuing reduction in sales would harm consumers who value the information at, say, $200. They get consumer surplus of $50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out – and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).}\]

\textsuperscript{126} The Court hints that modifying the product might be more cumbersome than contractual enforcement:

\[\text{To make price discrimination work…the seller must be able to control arbitrage…Vendors of computer software have a harder task (than airline carriers or movie producers). Anyone can walk into a retail store and buy a box….even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone. Instead of tinkering with the product and letting users sort themselves — for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price – ProCD turned to the institution of contract.}\]

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id.
Seventh Circuit disagreed, stating that “ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure.”\textsuperscript{131} It further noted that while contracts are often formed simply by paying for a product and walking out of the store, the U.C.C. permits contracts to be formed in other ways.\textsuperscript{132} Since \textit{ProCD}, courts have generally upheld the enforceability of shrinkwrap licenses.\textsuperscript{133}

As many scholars have noted, the \textit{ProCD} court’s analysis of the U.C.C. leaves much to be desired.\textsuperscript{134} U.C.C. section 2-204(1) states: “A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” Judge Easterbrook, writing for the court, turned this provision on its head so that the parties’ conduct no longer established the existence of the agreement. According to Easterbrook, the agreement assigned meaning to the conduct rather than the other way around. Under this analysis, the placement of software on a store shelf would not constitute an offer to sell that a consumer could accept by payment and dominion over the software copy (as the defendant had argued) nor, alternatively, would the consumer’s payment for the software constitute an offer that the store would accept by taking payment (as typically understood

\textsuperscript{131} \textit{Id.} at 1452.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} See Bowers v. Baystate Techs., 320 F.3d 1317 (Fed. Cir. 2003), Adobe Sys. v. One Stop Micro Inc., 84 F. Supp. 2d 1086 (N.D. Cal. 2000), Peerless Wall & Window Coverings, Inc., v. Synchronics, Inc., 85 F. Supp. 2d 519 (W.D. Pa. 2000). While a minority of courts has refused to enforce shrinkwrap licenses even after \textit{ProCD}, these cases lack a consistent rationale and are distinguishable on their facts. ). For example, the Supreme Court of Kansas in a recent opinion held that a shrinkwrap agreement submitted after the buyer had accepted the seller’s proposal was a request for modification. See Wachter Mgmt. Co. v. Dexter & Chaney, Inc., 144 P.3d 747 (2006). That court distinguished \textit{ProCD} v. Zeidenberg and Hill v. Gateway because those cases involved non-negotiated consumer contracts. \textit{See also} Klocek v. Gateway, Inc. 104 F. Supp. 2d 1332 (D. Kan. 2000) (finding the U.C.C. applicable to the sale of computers).
\textsuperscript{134} See Lemley, \textit{supra} note 7, at 468-69 (noting that the \textit{ProCD} court’s legal reasoning is “certainly questionable,”); \textit{see also} Post, \textit{supra} note 44 (stating that Judge Easterbrook ignored the U.C.C. sections 2-207 and 2-206, the commentary to these sections, the existing precedent interpreting the statute and the commentary of scholars and experts on Article 2). \textit{Id.} at 1226.
under traditional contract law). In fact, the meaning assigned to the buyer’s conduct would be determined by the agreement contained within the software box. Thus, if the terms within the box stated that the buyer agrees to pay a $50 monthly maintenance fee, then the buyer’s purchase and dominion of the software would indicate assent to that term even though the buyer did not know about the term until after completing the conduct which purports to establish such assent. Perhaps most notably, the ProCD court held that Zeidenberg demonstrated assent to the shrinkwrap license terms by retaining and using the software even though a consumer could be expected to undertake these actions for reasons other than to demonstrate assent. As Corbin stated,

> [A]n offeror can not, merely by saying that the offeree’s silence will be taken as an acceptance, cause it to be operative as such….It is substantially the same case as where an offeror attempts to give the meaning of an acceptance to some other ordinary act of the offeree that the latter wishes to do without giving it such a meaning. If A offers his land to B for a price, saying that B may signify his acceptance by eating his breakfast or by hanging out his flag on Washington’s birthday or by attending church on Sunday, he does not thereby make such action by B operative as an acceptance against B’s will.

Under the court’s analysis in ProCD, assent to the terms of a shrinkwrap license is presumed and the burden is placed upon the consumer to disaffirm assent. In other words, Easterbrook’s analysis places an affirmative obligation upon the consumer to establish non-consent to the terms of the shrinkwrap agreement – something which is anathema to contract law which has long maintained that silence, or inaction, should not

135 See Post, supra note 44, at 1226 (stating that “as most first year law students can tell you, a display of merchandise in a store window, and one supposes on a shelf, is nothing more than an ‘invitation to offer.’”)
136 Lemley, supra note 59, at 468 (noting that “the specified conduct that indicates acceptance is the opening of a package and the loading of software the consumer has already paid for – precisely the conduct one would expect the user to engage in if she had been unaware of the shrinkwrap license.”)
137 ARTHUR L. CORBIN, CONTRACTS, § 72 ().
constitute acceptance. Zeidenberg’s failure to object to the terms of the shrinkwrap agreement – which can only be expressed by taking affirmative steps to return the software – is thus construed as assent, even where such failure can be attributable to other causes, such as ignorance or logistical constraints.

An alternative, and better, contract law analysis of the transaction in ProCD would be that the terms of the shrinkwrap agreement do not govern the sales transaction, which is complete at the time the consumer makes payment and such payment is accepted by the store. The consumer does not and in fact, logically cannot, assent to these terms prior to the completion of the sales transaction. The terms fail as modifications to the sales transaction because they are not supported by consideration nor is the consumer compelled to accept any such attempted modifications. This does not mean that the terms of the shrinkwrap agreement are without any role or effect. The terms of the scope of license or terms of use provide the consumer with notice of the software producer’s business policies and the conditions upon which the software is being provided. The absence of the consumer’s express consent does not mean that those terms do not nonetheless govern the relationship. The consumer’s act of accepting the offer to sell the software (or, alternatively, the consumer’s offer to purchase the software which is then accepted by acceptance of payment) does not then give the consumer the right to establish the terms of the relationship with the software producer. While the consumer’s purchase of the software does not thereby demonstrate actual assent, assent to the scope of license terms can be presumed because the licensor has the power to

---

138 Id. at §§ 71-72; RESTATEMENT (SECOND) OF CONTRACTS § 69 (1978).
139 See Rolling, supra note 42, at 226 (noting that consumers are subject to retail store policies, and that those who live in rural areas may find it costly and time-consuming to drive to retail outlets or to return ship mail-ordered products).
establish the terms upon which the software shall be provided. The licensor’s ownership of the software entitles it to establish the parameters of its business provided that it does not trammel on the consumer’s unrelinquished preexisting rights or impose affirmative responsibilities unrelated to how the software is used. In other words, while the licensor does not have the right to force the licensee to undertake affirmative acts or to relinquish legal rights, nor should the licensee have the right to provide the terms by which the licensor chooses to conduct its business.\textsuperscript{141}

2. Clickwrap licenses.\textsuperscript{142}

ProCD addressed the enforceability of a shrinkwrap license that accompanies the purchase of software contained in a box. In many cases, however, software is distributed over the Internet pursuant to the terms of a clickwrap agreement. In some ways, clickwrap agreements are less problematic than shrinkwrap agreements for the simple reason that a user expressly manifests assent by clicking.\textsuperscript{142} Generally, clickwrap agreements do not permit a user to progress until and unless the user clicks on a box containing the words “I agree” or some similar expression of agreement. Often, the user is asked to acknowledge the terms of a clickwrap agreement by clicking more than once. But not all clickwrap agreements are alike. While some agreements display all their provisions on a single computer page, many clickwrap agreements appear in small textboxes that require constant scrolling in order to review their terms. The “assent”

\textsuperscript{140} For a discussion of the role of normative assumptions in contract law, see generally Joo, supra note 76.
\textsuperscript{141} See also Nimmer, supra note 62, at 950 (critiquing opponents of standard form contracts who take a “result-oriented” position that favors buyers and holds that “the transferee should be entitled to receive a transfer including specific terms, regardless of the terms sought by the other party.”)
buttons, however, do not appear within the text box but are readily apparent alongside them on the screen. This cumbersome and aggravating method of providing clickwrap terms, while simultaneously facilitating the user’s ability to express assent, seems specifically designed to encourage users to simply click on the “I agree” button without reading the terms.143

Clickwrap agreements do not raise the same contract formation concerns as shrinkwrap agreements because the user typically has notice of the terms and has an opportunity to read them prior to engaging in the contractual relationship. A user is also not required to take onerous affirmative steps to disaffirm the contract by, for example, returning the merchandise; a simple click will do.144 Courts have refused to uphold clickwrap agreements if users do not have sufficient notice of their terms, or do not have to affirmatively accept the terms of use.145 This does not mean that clickwrap agreements do not raise any contractual issues at all. In particular, many commentators find their “take-it-or-leave-it” nature troubling; they are not, however, inherently more troubling than other contracts of adhesion simply because their terms are digital rather than inscribed on paper.146

---

143 See e.g., www.terrioronguard.com. Several courts have made this observation as well. See e.g., Scarcella v. Am. Online, No. 1168/04, 2004 N.Y. Misc. LEXIS 1578, at *2-3 (N.Y. Civ. Ct. Sept. 8, 2004) (noting that the presentation of the agreement made it easy to skip reading the terms: “Defendant considerately makes it very easy to avoid going to the trouble of slogging through all of that text. The customer can bypass all that bother by simply pressing the “OK, I Agree” button. If the customer nonetheless bites the bullet and presses the “Read Now” button, Defendant affords him or her a second opportunity to skip over what will become the contract between the parties.”).


145 See Specht v. Netscape Commc’ns Corp., 306 F.3d 17 (2d Cir. 2002) (refusing to enforce an arbitration clause contained in a license agreement that was not readily apparent to user downloading software); Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974 (E.D. Cal. 2000) (refusing to enforce an online license agreement because the link to it was not sufficiently obvious).

146 For a comprehensive analysis and comparison of paper-based and electronic-based standard form contracts, see Hillman & Rachlinski, supra note 29.
One of the first cases to address the issue of clickwrap agreements *CompuServe, Inc. v. Patterson*,147 involved a forum selection clause. The defendant, Patterson, was a resident of Houston, Texas who claimed never to have visited Ohio.148 The plaintiff was CompuServe, a computer information service headquartered in Columbus, Ohio.149 Patterson subscribed to CompuServe’s computing and information services via the Internet and placed certain computer software products as “shareware” on the CompuServe system for others to use and purchase.150 When Patterson became a shareware provider, he entered into a “Shareware Registration Agreement” (“SRA”) with CompuServe.151 Pursuant to the SRA, CompuServe provided its subscribers access to the shareware that Patterson created as an independent contractor.152 The SRA incorporated by reference two other documents, the CompuServe Service Agreement (the “Service Agreement”) and the Rules of Operation. Both the SRA and the Service Agreement stated that they were entered into in Ohio.153 The Service Agreement further provided that its terms were governed by and construed in accordance with Ohio law.154 The court noted that the SRA required Patterson to type “AGREE” at various points in the document “in recognition of [his] on line agreement to all the above terms and conditions.”155 Patterson marketed his software for several years on CompuServe’s system.156 CompuServe later began to market a similar software product, which gave rise to Patterson’s allegations of trademark infringement. CompuServe filed a declaratory

147 89 F.3d. 1257 (6th Cir., 1996).
148 Id. at 1260.
149 Id.
150 Id.
151 Id.
152 Id.
153 Id.
154 Id.
155 Id. at 1260-61.
judgment in the federal district court for the Southern District of Ohio, relying on the court’s diversity subject matter jurisdiction.\textsuperscript{157} Patterson filed a motion to dismiss on several grounds, including lack of personal jurisdiction.\textsuperscript{158} The district court granted Patterson’s motion to dismiss for lack of personal jurisdiction.

On appeal, the Sixth Circuit addressed the issue of whether Patterson’s contacts with Ohio were sufficient to support the district court’s exercise of personal jurisdiction.\textsuperscript{159} The Sixth Circuit referred to the Internet as representing “perhaps the latest and greatest manifestation of…historical globe-shrinking trends.”\textsuperscript{160} The court assumed the enforceability of the clickwrap agreement, noting that Patterson “entered into a written contract with CompuServe which provided for the application of Ohio law,” and stated that he “then purposefully perpetuated the relationship with CompuServe via repeated communications with its system in Ohio.”\textsuperscript{161} The court emphasized that Patterson was “far more than a purchaser of services; he was a third-party provider of software who used CompuServe, which is located in Columbus, to market his wares in Ohio and elsewhere.”\textsuperscript{162} The court stated that while “merely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio,” that act in conjunction with Patterson’s placement of his software product into the stream of commerce and other factors established sufficient contact to establish

\begin{footnotes}
\item[156] \textit{Id.}
\item[157] \textit{Id.} CompuServe sought a declaration that it had not infringed any common law trademarks of Patterson’s, or of Patterson’s company, FlashPoint Development, and that it was not otherwise guilty of unfair or deceptive trade practice. \textit{Id.}
\item[158] \textit{Id.}
\item[159] \textit{Id.}
\item[160] \textit{Id.} at 1262.
\item[161] \textit{Id.} at 1264.
\item[162] \textit{Id.} at 1264.
\end{footnotes}
jurisdiction.\textsuperscript{163} Patterson manifested actual assent to the SRA first at his computer in Texas, which was then transmitted to CompuServe in Ohio.\textsuperscript{164}

In \textit{Caspi v. Microsoft Network, LLC},\textsuperscript{165} the Superior Court of New Jersey upheld a forum selection clause in a click-wrap agreement. \textit{Caspi} involved a class action complaint against Microsoft\textsuperscript{166} arising out of Microsoft’s alleged practice of “unilateral negative option billing.”\textsuperscript{167} The named plaintiffs were residents of different states and they purported to represent a nationwide class of 1.5 million MSN members. Microsoft moved to dismiss the complaint for lack of jurisdiction and improper venue by reason of a forum selection clause, which was in every MSN membership agreement and thus, purported to bind all the named plaintiffs and members of the class.\textsuperscript{168} The forum selection/choice of law clause provided that the governing law was that of the State of Washington, and each member consents “to the exclusive jurisdiction and venue of courts in King County, Washington in all disputes arising out of or relating to your use of MSN or your MSN membership.”\textsuperscript{169}

Finally, in \textit{Davidson & Associates v. Jung},\textsuperscript{170} the Court of Appeals for the Eighth Circuit upheld a clickwrap agreement that prohibited reverse engineering. In that case, the appellee, Blizzard, created and sold software games, and provided a gaming service

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{163} \textit{Id}. at 1265.
\item\textsuperscript{164} \textit{Id}. at 1261.
\item\textsuperscript{166} The defendants were two related corporate entities, Microsoft Network, LLC and Microsoft Corporation but this Article will refer to them both simply as “Microsoft,” as did the court in the actual case. \textit{See id}. at 529.
\item\textsuperscript{167} Under this practice, Microsoft without notice or permission from MSN members, unilaterally increased membership fees attributing the change to changes in the service plans. \textit{Id}.
\item\textsuperscript{168} \textit{Id}.
\item\textsuperscript{169} \textit{Id}.
\item\textsuperscript{170} 422 F.3d 630 (8th Cir. 2005).
\end{enumerate}
\end{footnotesize}
available exclusively to purchasers of its games.\textsuperscript{171} Because it was concerned about piracy, Blizzard restricted access to its service and required agreement to a clickwrap agreement that prohibited reverse engineering. By reverse engineering, the appellants were able to create an online gaming system as an alternative to Blizzard’s system. The appellants’ system contained operational differences from Blizzard’s system and enabled users to play pirated versions of appellee’s games.\textsuperscript{172} The Court stated that the appellants had expressly relinquished their right to reverse engineer by agreeing to the terms of the license agreement.\textsuperscript{173}

3. Browse-wrap Agreements

Browsewrap agreements are terms that are posted on a website and that do not require users to affirmatively manifest their consent. In most cases, the website or the browsewrap includes a statement that the user’s continued use of the website or the downloaded software manifests assent to those terms. Often, the terms of browsewraps are prominently displayed; but the existence of the browsewrap itself is hidden on a page that few users bother to visit – the “Legal” or “Terms” pages.\textsuperscript{174} Unless the user is expressly looking for such information, she or he is unlikely to find it.

Generally, courts will enforce browsewrap agreements only if the user had adequate notice of their terms.\textsuperscript{175} In other words the terms must be both conspicuous and

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{171} Id. at 633.
\item\textsuperscript{172} Id. at 636.
\item\textsuperscript{173} Id. at 639.
\item\textsuperscript{175} Mark Lemley has argued that enforcement of browsewraps should be limited to sophisticated commercial entities who are repeat players. \textit{See generally} Lemley, \textit{supra} note 7..\end{itemize}
\end{footnotesize}
accessible. In *Specht v. Netscape Communications Corp.*,\(^{176}\) for example, the Second Circuit refused to enforce an arbitration clause in a browsewrap agreement because users were able to download the free software without indicating assent or acknowledging the license agreement. Furthermore, in order to view the license terms, the users were required to scroll down *past* the software download button and then access the agreement by clicking on a hyperlink. Notice was also at issue in *Pollstar v. Gigmania, Ltd.*,\(^{177}\) where the court refused to enforce the terms of an online license agreement because the link to it was hard to read. Notably, that court did not rule that the license agreement was unenforceable, only that the website did not give users adequate notice of it. In *Register.com v. Verio, Inc.*,\(^{178}\) the Second Circuit found that Verio’s continued use of Register.com’s WHOIS database constituted consent to Verio’s terms of use, expressly rejecting Verio’s argument that they were not enforceable because the user had not clicked an “I agree” icon. Finally, in *Ticketmaster Corp. v. Tickets.com, Inc.*,\(^{179}\) Ticketmaster claimed that Tickets.com’s use of automated search software violated Ticketmaster’s terms of use. Tickets.com used information obtained through its search software to provide “deep links” from its website to Ticketmaster’s event listings, thus enabling Tickets.com users to bypass Ticketmaster’s homepage. A prominent notice on Ticketmaster’s website stated that by proceeding beyond the home page, the user had accepted the terms of use. The court agreed, ruling that a contract could be formed,

\(^{176}\) 306 F.3d 17 (2d Cir. 2002).
\(^{178}\) 356 F.3d 393 (2d Cir. 2004).
simply by proceeding to Ticketmaster’s interior web pages “after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing so.”

B. Balancing Individual Autonomy with Business Interests

Although courts analyze licenses as contracts, traditional contract doctrine often fails to explain the wide range of judicial decisions. In fact, courts often struggle against the constraints of contract law, and the requirements of notice and assent, in order to enforce the terms of a shrinkwrap or browsewrap agreement that pass the test of reasonableness but fail on the issue of formation. In ProCD, for example, Judge Easterbrook found mutual assent to enter into the shrinkwrap agreement, even though logically, how could one enter into a contract without even knowing of its existence?

Clickwrap agreements, although often lumped together with browsewrap and shrinkwrap agreements, are less troubling from a doctrinal perspective in that they require a manifestation of consent (albeit blanket consent) by the user. In reality, however, this distinction is one without a difference. While the licensee’s click manifests assent to the transaction and to the contractual relationship, often the user does not read – and therefore, cannot actually assent to -- the contractual terms themselves.

---

180 In a previous decision on the case, the court ruled that merely posting terms and conditions on a website does not create a contract unless the user had actual knowledge of the contract terms. Ticketmaster Corp. v. Ticket.com, Inc., No. CV99-7654-HLH(BQRx), 2000 U.S. Dist. LEXIS 12987 (Cal. Aug. 10, 2000), aff’d without opinion 248 F.3d 1173 (9th Cir., 2001).

181 In fact, Mark Lemley has suggested that judicial decisions enforcing clickwrap and shrinkwrap agreements may have conditioned courts to disregard the concept of assent when it comes to browsewraps. See Lemley, supra note 7, at 469.

182 The Second Circuit in Register.Com, Inc. v. Verio, Inc, recognized the difference between notice as a prerequisite to performance and the dubious need for expressions of assent when it stated: [t]here is a crucial difference between the circumstances of Specht, where we declined to enforce Netscape’s specified terms against a user of its software because of inadequate evidence that the user had seen the terms when downloading the software, and those of Ticketmaster, where the taker of information from Ticketmaster’s site knew full well the terms on which the information was offered but was not offered an icon marked “I agree,” on which to click. Under the
The cases governing non-negotiated software licenses frame the issue as one of contract formation. But in order to understand the wide range of judicial opinions, it is necessary to move beyond a discussion of contract doctrine and examine the business environment in which these licenses were created. As the court in *Step-Saver Data Systems, Inc. v. Wyse Technology* noted in discussing shrinkwrap licenses:

When these form licenses were first developed for software, it was, in large part, to avoid the federal copyright law first sale doctrine...Because of the ease of copying software, software producers were justifiably concerned that companies would spring up that would purchase copies of various programs and then lease those to consumers. Typically, the companies, like a videotape rental store, would purchase a number of copies of each program, and then make them available for over-night rental to consumers. Consumers, instead of purchasing their own copy of the program would simply rent a copy of the program, and duplicate it. This copying by the individual consumers would presumably infringe the copyright, but usually it would be far too expensive for the copyright holder to identify and sue each individual copier. Thus, software producers wanted to sue the companies that were renting the copies of the program to individual consumers, rather than the individual consumers.

As many commentators have argued, these types of agreements (and form agreements in other industries) provide a societal benefit by facilitating transactions. In other words, they should be enforced not because they manifest the classic signs of bargaining, but because they are good for society, and are generally not harmful to the licensee. As Easterbrook notes in *ProCD*,

Ours is not a case in which a consumer opens a package to find an insert saying “you owe us an extra $10,000” and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the U.C.C. requires a seller to maximize the buyer’s net gains.

---

circumstances of *Ticketmaster*, we see no reason why the enforceability of the offeror’s terms should depend on whether the taker states (or clicks) “I agree.”...We recognize that contract offers on the Internet often require the offeree to click on an “I agree” icon. And no doubt, in many circumstances, such a statement of agreement by the offeree is essential to the formation of a contract. But not in all circumstances.
But is Easterbrook actually saying that consent should be foisted upon an
unwitting consumer who is then forced to disavow such consent? Is it fair to place an
affirmative obligation upon B to “decline” this unreasonable contract term?

A more palatable explanation of the rationale underlying ProCD and other cases
upholding contracts “formed” without notice, is that there is little harm in enforcing the
contractual term. While actual assent may be missing, the consumer’s assent can be
presumed because the consumer would have agreed to the term if he or she had actually
read it or else the licensor would not have permitted the transaction at all. In nearly all
the cases upholding the terms of a non-negotiated software license, the licensor was suing
because the licensee was using the software or product in a manner expressly prohibited
by the licensor, not because the licensor wished to enforce an affirmative obligation term
(such as payment of additional money). The courts, while using the language of
contract law, were deferring to the notions of fair business practices.

The courts must use the language of contracts because the contract is the vehicle
by which the license is made, but it is the transfer of (some) rights that affects the
analysis of the contract. If, for example, the shrinkwrap license is not enforceable as a
contract due to lack of assent, then the licensor has lost control over how the software is
used. If the licensee then decides to use the data stored in the software to undermine the
licensor’s business, the licensor is helpless to prevent it. Although the licensor does not

---

183 See Jacques de Werra, Moving Beyond the Conflict Between Freedom of Contract and Copyright
Policies: In Search of a New Global Policy for On-line Information Licensing Transactions, 25 COLUM.
J.L. & ARTS 239, 263 n.130 (2002) (noting that “commercial use is basically not fair use”).
184 See id. (observing that the defendant in ProCD v. Zeidenberg “cannot be considered as the best example
of an oppressed private user on whom the content owner would have imposed unduly restrictive contractual
conditions, appearing instead as a free-riding competitor. Viewed from a transatlantic perspective,
Zeidenberg’s activities would typically have been prohibited by general unfair competition laws or laws
have an obligation to provide the data in the first place, if the licensor does, the licensee may use it in a manner that hurts the licensor’s business unless the licensor can protect itself with the only means available – a contract. Without a legal right to stop the licensee from using the software to the licensor’s detriment, there is then no economic incentive for the licensor to develop and distribute the data in the first place.\textsuperscript{185} The intangible nature of the product, that is, not the disc itself but the information contained therein, makes the need for contract enforcement – the tangible quality of the words on the page or on the website – more compelling.\textsuperscript{186} If I decide to sell my car to you, I no longer have the right to tell you what to do with it. If I lease my car to you, however, it remains mine and I should therefore have the ability to set parameters on your use. If I own a store, your presence is permitted unless I decide to kick you out. If you purchase an item of clothing from my store, your ability to return it is subject to my policy on exchanges and refunds. If, however, you use my website and accompanying services to solicit my unwitting customers to your competitor website, thereby undermining my business, I cannot stop you unless I have a contractual right to do so. Unlike in the real world, I cannot kick you out of my store or repossess the car. The only method of enforcement available to me is afforded by contract.

Generally, the court decisions in this area recognize the technology provider’s dilemma and, in the interests of furthering economic efficiency and facilitating specifically protecting database producers so that the thorny issues regarding both the validity of the contract and the preemption analysis could have been totally avoided.”\textsuperscript{185} See generally Frank H. Easterbrook, \textit{Contract and Copyright}, 42 HOUS. L. REV. 941 (2005). See also O’Rourke, \textit{supra} note 1, at 496-99 (discussing why licensors may feel the need to include particular provisions that track the Copyright Act).

\textsuperscript{186} See Madison, \textit{supra} note 73, at 290-91 (discussing how the “former implicit and limited governance defined by control of access to chattel and licensing of copyright evaporates” with digital technology and how the software license tries to “replicate” it).
business, have enforced these agreements – at least where there has been notice. Often, notice has been interpreted as an “opportunity to read,” even where such opportunity was in practicality, fictitious. The decisions, however, reveal that the lack of notice and an opportunity to read prior to the transaction does not necessarily render an agreement invalid; a particular provision, however, should not be enforced until the

187 For a discussion of form agreements generally, see Kessler, supra note 11. ; Rakoff, supra note 13.
188 In ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996)., for example, the court addressed the realities of the way business is conducted in the software industry:

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer pay place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with Byte-Pusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms--so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

Id. at 1452.

189 The court in ProCD, Inc. v. Zeidenberg for example, noted that in certain industries, transactions in which the exchange of money precedes detailed terms is common and requiring consumers to actually sign contractual terms would result in higher prices and greater inconvenience:

Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous....Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the U.C.C. in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information--but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract. ProCD, Inc., 86 F.3d . at 1451.
licensor has received actual notice of the provision. In other words, the licensee’s obligation to perform in accordance with the terms of use arises when the licensee becomes aware of such terms, not when the transaction is entered into.

For example, in Register.com v. Verio, Inc., the defendant Verio sold a variety of web site design, development, and operation services which competed with the plaintiff Register.com’s web site development business. Verio obtained daily updates of information from Register.com’s computers relating to newly registered domain names via an automated software program. Verio's practice of e-mail solicitations to those registered names was inconsistent with the terms of the restrictive legend Register attached to its responses to Verio's queries. Some of the recipients of Verio's solicitations believed they were coming from Register (or an affiliate), and were sent in violation of the registrant's election not to receive solicitations from Register. When Register sent Verio a cease and desist letter, it refused. Verio claimed that it never became contractually bound to the conditions imposed by Register's restrictive legend because, in the case of each query Verio made, the legend did not appear until after Verio had submitted the query and received the WHOIS data. Verio contended that it did not receive legally enforceable notice of the conditions Register intended to impose and

---

The court in Pollstar v. Gigmania, Ltd., 170 F.Supp. 2d 974 (2000), cited to the ProCD court’s rationale, concluding that while the court agrees with Gigmania that the user is not immediately confronted with the notice of the license agreement, this does not dispose of Pollstar’s breach of contract claim. Taking into consideration the examples provided by the Seventh Circuit – showing that people sometimes enter into a contract by using a service without first seeing the terms – the browser wrap agreement may be arguably valid and enforceable.

Id. at 982. See also Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

190 356 F.3d 393 (2d Cir. 2004).

191 Id. at 396-97.

192 Id. at 401.
therefore, should not be deemed to have taken WHOIS data from Register's systems subject to Register's conditions. The court rejected Verio’s argument, stating that:

Verio's argument might well be persuasive if its queries addressed to Register's computers had been sporadic and infrequent. If Verio had submitted only one query, or even if it had submitted only a few sporadic queries, that would give considerable force to its contention that it obtained the WHOIS data without being conscious that Register intended to impose conditions, and without being deemed to have accepted Register's conditions. But Verio was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted. Furthermore, Verio admits that it knew perfectly well what terms Register demanded. Verio's argument fails.193

In other words, even if Verio was not aware of Register.com’s terms of use at the time it entered into the transaction, it subsequently became aware of the terms. While Verio did not have an opportunity to read the terms prior to each transaction, because it engaged in multiple transactions, it had actual notice of such terms at the time Register.com contacted it. If, however, Register.com had sued Verio for breach of contract after the first transaction (and assuming that it had not sent Verio a cease and desist letter), the results would be otherwise. As the court notes:

The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples - 50 cents apiece." D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money. P sues D in contract for the price of the apples taken. D defends on the ground that on no occasion did he see P's price notice until after he had bitten into the apples. D may well prevail as to the first apple taken. D had no reason to understand upon taking it that P was demanding the payment. In our view, however, D cannot continue on a daily basis to take apples for free, knowing full well that P is offering

193 Id.
them only in exchange for 50 cents in compensation, merely because the sign demanding payment is so placed that on each occasion D does not see it until he has bitten into the apple.\textsuperscript{194}

The licensee’s claim of “lack of notice” is disingenuous, not because it had such notice at the time the transaction was entered into, but because it subsequently had notice and chose not to comply with such terms.

Similarly, in \textit{ProCD v. Zeidenberg}, the defendant was being sued for using the ProCD data in a manner that the defendant knew was contrary to the licensor’s business model given the pricing differential of the commercial and non-commercial versions of the product. As the owner of the software, the licensor has the right to establish the way in which his or her property may be used and how it might price its product. Zeidenberg had no independent right to use that software, and is only permitted to do so pursuant to a license granted by ProCD. The issue of whether Zeidenberg actually assented to the scope of license terms is irrelevant; what is relevant is that he knew what they were when he engaged in the prohibited behavior. While Zeidenberg is not obligated to act in accordance with such terms until he becomes aware of them, once he becomes aware of the terms of use, he is bound by them. The same is not true if the provisions impose an affirmative obligation or deprive the licensee of a legal right. ProCD, as licensor, cannot force Zeidenberg to perform affirmative acts (such as start a business promoting ProCD’s products) via a shrinkwrap license; it can, however, determine the scope of the license granted to Zeidenberg. Zeidenberg, in purchasing the software, is buying only a limited right to use the software without being sued by the actual owner – ProCD – and that permission is granted contingent upon the terms of use contained in the license. The

\textsuperscript{194} \textit{Id.}
grant of that permission, however, cannot diminish Zeidenberg’s preexisting legal rights. Returning to the car leasing analogy, if I let you lease my car, I can set the parameters of your use. If you don’t abide by my wishes, I can take away your right to use my car. If you are not aware of my conditions – for example, that I do not want you to smoke in my car – you can smoke until I find out about it and tell you to stop. You cannot continue to smoke in my car knowing that I don’t want you to because it is, after all, my car. Nor can I make you pay for cleaning the car to rid it of the odor of smoke unless you knew beforehand that smoking was prohibited. I can impose conditions of use, but you must actually be aware of them before I can enforce them against you. Furthermore, while I can impose conditions of use upon you, I cannot impose affirmative obligations upon you that are unrelated to how you use my car.

C. Sample License Analysis

This Article argues that those terms that are part of a non-negotiated license agreement include those to which the licensee has actually assented, and those pertaining to the scope of license or terms of use that do not impose affirmative obligations or deprive the licensee of legal rights. What happens then in the event that a non-negotiated license agreement contains affirmative obligation terms unrelated to the scope of the license to which the licensee has not actually assented?

I have applied my methodology to a sample shrinkwrap license agreement containing many of the provisions found to be standard in such agreements. In bold, I

195 For a discussion of terms commonly found in shrinkwrap agreements, see Lemley, supra note 5, at 1242-48 (examining the purpose underlying proprietary rights, limitation on warranties, and limitation on user rights provisions).
have indicated how my proposed methodology would be applied in determining the enforceability of the agreement:
SAMPLE LICENSE AGREEMENT

By opening this package and installing the product, you are consenting to be bound by this License. If you do not agree to all of the terms of this License, return the product to the place of purchase for a full refund within thirty (30) days. [This provision imposes an affirmative obligation upon the licensee and would not be enforceable because there is no actual assent].

LICENSE
Company ABCXYZ (“the Licensor”) retains all title, copyright, and other intellectual property rights in VRS-Home (“the Software”) and hereby grants you (“the Licensee”) a non-exclusive License to use the Software enclosed. Licensor retains all rights not expressly granted herein. [This sentence clarifies the nature of the transaction as being a license, and not a sale or transfer of ownership rights. Because it does not impose affirmative obligations upon the licensee or deprive the licensee of legal rights, it should be enforceable]. Licensee shall not disclose, provide, or otherwise make available any trade secrets, copyrighted or patented material, in any form to any third party. All terms of this License are in effect to the fullest extent permissible under applicable law. [It is unclear what “make available” means. If it means that the Licensee is prohibited from permitting third parties to infringe upon the trade secret, copyright or patent rights of the Licensor, it merely informs the Licensee of its existing legal obligations. If it means that the Licensee cannot permit third parties to use the software, that restriction is covered in the section on Scope of License. If the intent of this provision is to impose an obligation on the Licensee to hide the software from third parties, it is not enforceable. The prohibition against disclosure of trade secrets seems particularly nonsensical. The typical consumer Licensee is not privy to confidential information and the software is being sold to the public at large.196 Because this sentence imposes a blanket obligation of non-disclosure upon the Licensee, it should not be enforceable].

SCOPE OF LICENSE
This is a License and not a sale. Licensee may use the Software on a single computer under Licensee’s personal control, but may not run the Software on any computer, system, or network, which permits use by more than one person at a time. Licensee may make one copy of the Software for back-up purposes only. Licensee may transfer the Software to another user who accepts the terms of this License, provided that Licensee assigns all rights and obligations under this License to such other

196 See Hemnes, supra note 63, at 577-81 (explaining that lawyers for software developers used to think that the only protection for their client’s programs was under trade secret law but in order to do so, the right of possession had to be separate from the right of alienation); Lemley, supra note 5, at 1281 (noting that shrinkwrap licenses permit software vendors to obtain both patent and trade secret protection concurrently in different aspects of the same program, as well as copyright protection in the whole program with the result being that “vendors can obtain the powerful rights of patent law without having to ‘pay the price’ of a shorter term and the loss of trade secret protection.”).
person and erases all copies of the Software under Licensee’s control. Licensee may not use, sell, rent, or deal with Software in any way other than as expressly provided herein. Licensee may not modify, adapt, alter, change, reverse engineer, or transform the Software, except to the extent permitted by law. [This provision provides the terms of use or the conditions under which the Licensor licenses its software. The Licensee should not have the right to use the software in a manner prohibited by the Licensor. Furthermore, the Licensee does not have the legal right to use the software at all without the Licensor’s permission, which the licensor is granting only with these restrictions. Generally, prohibitions against modifying and reverse engineering deprive the licensee of a right expressly granted under the Copyright Act; however this particular reference expressly permits such activities “to the extent permitted by law.” Consequently, this provision would be enforceable]. 197

TERM
This License shall remain in effect only for so long as Licensee is in compliance with the terms and conditions set forth herein. License terminates automatically if Licensee fails to comply with any of its terms and conditions. Licensee agrees, upon termination, to destroy all copies of the Software. [This provision sets forth terms of use, and termination of the right to use, the software. As it does not impose an affirmative obligation or deprive the licensee of a legal right, it should be enforceable]. The intellectual property rights, limited warranty, and limitation of liability provisions set out in this License shall continue in force after termination. [This provision requires actual assent].

WARRANTIES
THE LICENSOR HEREBY DISCLAIMS ANY AND ALL WARRANTIES WITH RESPECT TO THE SOFTWARE, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF FITNESS FOR PARTICULAR PURPOSES OR MERCHANTABILITY, NON-INFRINGEMENT, SATISFACTORY QUALITY, INTEGRATION, OR LIABILITY ARISING FROM ANY COURSE OF DEALING, USAGE OF TRADE, OR TRADE PRACTICE. LICENSEE AGREES THAT THE SOFTWARE IS BEING PROVIDED “AS IS” AND THAT LICENSOR HAS MADE NO EXPRESS WARRANTIES REGARDING THE SOFTWARE. THE ENTIRE RISK AS TO FUNCTIONALITY AND OPERATION OF THE SOFTWARE LIES WITH THE LICENSEE, AND LICENSOR ASSUMES NO RISK OR OBLIGATION IN CONNECTION THEREWITH.

197 In Davidson & Assocs. v. Jung, 422 F. 3d 630 (8th Cir. 2005). the appellants were able to create an alternative online gaming system by reverse engineering. While the court in that case upheld the prohibition against reverse engineering contained in the contract, under the approach proposed in this Article, such a prohibition would require actual assent. The appellants in Davidson & Associates, however, would still be prohibited from the infringing activity under the Digital Millenium Copyright Act, which prohibits a person from circumventing a technological measure that controls copyrighted protected works. See id. at 639-42.
LIMITED LIABILITY

IN NO EVENT SHALL LICENSOR BE LIABLE FOR ANY LOSS OR DAMAGE OF ANY KIND, INCLUDING, BUT NOT LIMITED TO INTERRUPTION OF BUSINESS, LOSS OF USE, AND INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND, REGARDLESS OF FORM OF ACTION, WHETHER CONTRACT OR TORT (INCLUDING NEGLIGENCE). THIS EXCLUSION COVERS ANY LIABILITY THAT MAY ARISE OUT OF FORESEEABLE THIRD-PARTY CLAIMS AGAINST LICENSEE.

IN NO EVENT SHALL LICENSOR’S LIABILITY EXCEED THE PRICE PAID BY LICENSEE.

[Under the U.C.C., the licensee would have the right to certain implied warranties; however, the U.C.C. recognizes and permits warranty disclaimers provided that they are conspicuous, mention merchantability and are in writing. The enforceability of this disclaimer would depend upon how the relevant state implements and interprets the U.C.C. provisions governing warranties and warranty disclaimers. The U.C.C. does not expressly require the consumer’s assent to warranty disclaimers, although the requirements of conspicuousness indicate that the drafters viewed such disclaimers as being contractual in nature. In addition, the provisions must comply with the federal law governing written warranties, the Magnuson Moss Warranty Act. If these provisions do comply, then they should be enforceable. Limitations of liability are also permitted under the U.C.C. provided that they do not fail of their “essential purpose.”

198 Section 2-314 states that “…a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” Section 2-312 (3) states that “a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement…”
199 Under U.C.C. 2-316(2): “…to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous…”
200 The issue of whether the provisions comply with the UCC requirements may nevertheless pose some difficulties. For example, in Rinaldi v. Iomega Corp. No. 98 C-09-064-RRC, 1999 Del. Super. LEXIS 563 (Del. Super. Ct. Sept. 3, 1999), the Delaware Superior Court held that a warranty disclaimer in a rolling contract was conspicuous even though it was located within the product packaging. For a critique of that case, see Friedman, supra note 12, at 691-95 (“The Rinaldi courts reasoning on conspicuousness was far from unassailable and demonstrates some of the weaknesses of using conspicuousness to assess the timing of disclaimers.”) Id. at 692. The Rinaldi court relied too literally on ProCD, thus illustrating the danger of claiming actual assent where there is in fact, none. If the court in ProCD had expressly stated that it was presuming assent to the scope of license terms – and no other - the Rinaldi court would had no precedent for claiming that there was actual assent to all packaged terms. Implied warranty disclaimers are clearly not conspicuous if they are contained within the package and unavailable for inspection until after purchase.
201 Section 2-719 provides that “the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts.”
202 Section 2-719(2).
enforceability would depend on how a particular jurisdiction has interpreted the U.C.C. provision governing limitations of liability.]

**INDEMNITY**
Licensee agrees to indemnify Licensor for any third-party claims arising out of misuse, infringing use, or other illegal use of Software. [This provision uses language that appears to impose an affirmative obligation upon the Licensee. Ordinarily, the Licensee would be liable for any infringement caused by her misuse; however, she would not be obligated to indemnify the Licensor against all claims filed against the Licensor. Because the provision imposes an affirmative obligation upon the Licensee, it would not be part of the agreement between the parties without actual assent. As a practical matter, a third party suing the Licensor on the basis of misuse by Licensee would have to prove the Licensor’s involvement, whether by passive knowledge or active assistance].

**GOVERNING LAW**
This License shall be governed by and construed in accordance with the substantive laws in force in the State of California. Licensee agrees that all claims shall be subject to binding arbitration under the rules of the AAA. This License constitutes the entire agreement between the parties with respect to use of the Software and supersedes any previous agreements. [This provision restricts the Licensee’s ability to bring a lawsuit. This provision is enforceable if the Licensee actually assented to it. If it did not, then assent cannot be presumed. The court would then refer to the Magnuson Moss Warranty Act, which permits informal dispute resolution procedures provided they conform to certain requirements].

**III. CONCLUSION**
The question of whether the owner of a product can sell the product is different from whether the owner must sell it. The owner of the intellectual property rights to software code may be free to sell copies of its software but, for whatever reason, may wish to license copies instead. Licensors may fear that the manipulability of software
makes it susceptible to infringers who may be difficult to locate and control. Those who claim that a producer of software is adequately protected by patent law ignore that many software producers do not file patents. I do not wish to resolve in this Article whether a licensor’s fears of infringement are legitimate; my Article assumes that they are. Regardless of whether this fear is well-founded, owners of intellectual property should be permitted to establish the parameters of their business. The freedom to do so, however, is subject to the preexisting rights of the licensee. The courts have used the language of contract law to uphold non-negotiated software licenses even where actual assent was absent. This Article argues that rather than upholding such agreements by claiming that the licensee actually assented to the terms, the courts should expressly acknowledge the use of presumed assent. Presumed assent should only be applied to the scope of the license terms or the terms of use. A finding of presumed or actual assent is necessary to contract formation; however, a contract might still be found unenforceable if traditional contract defenses, such as unconscionability, are applicable. Furthermore, the obligation to perform in accordance with the terms of use or the scope of license should

205 See Madison, supra note 73, at 313-14 (“(in) a world of mass-marketed software…developers needed a mechanisms to protect both copyright interests and their confidential information while simultaneously sharing these products with the world at large.”)


207 As Mark Lemley explains, while today it is generally accepted that copyright law protects computer software, in the late 1970s and 1980s the issue of whether copyright law protected computer programs was unresolved until the enactment of the 1980 amendments to the Copyright Act. The same uncertainty reigned over the patentability of computer software. See Lemley, supra note 5, at 1242-43. See also O’Rourke, supra note 1, at 488-90 (noting the ways in which the soft copy world differs from the hard copy world which may compel licensing of software). Providers of electronic databases, however, may not be protected under copyright law and may need the protection offered by a license. See ProCD, Inc. v. Zeidenberg, 96 F.3d 1447, 1449 (7th Cir. 1996). See also Jennett M. Hill, Note, The State of Copyright Protection for Electronic Databases beyond ProCD v. Zeidenberg: Are Shrinkwrap Licenses a Viable Alternative for Database Protection? 31 Ind. L. Rev. 143 (1998).

208 For a discussion of evolution of the clickwrap agreement as a mechanism for protecting the commercial value of computer programs and databases, see Michael J. Madison, Rights of Access and the Shape of the Internet, 44 B.C. L. Rev. 433, 446-52 (2003).
be subject to notice. Thus, the condition to the effectiveness of those provisions where there is only presumed, not actual, assent should depend upon an opportunity to read the terms.