The Harmonization of Browsewrap Agreements Abroad and the Protection of American Consumers

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Note

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By Ashley A. Tinsley
I. Introduction

Browsewrap agreements are binding legal contractual terms typically located at the bottom of a website.¹ To accept the terms of a browsewrap agreement, one merely has to use the site—with or without the knowledge that an agreement exists.² Because browsewrap agreements do not require the traditional affirmative acceptance that is typically associated with contractual agreements, many articles have been written discussing whether or not browsewrap agreements should be enforced at all.³ In an international context, the importance of this question is heightened since the Internet easily transcends national boundaries. In addition, the binding terms of most browsewrap agreements are not enforceable under legal standards set by the European Unfair Contract Terms Directive.⁴ The text of the European

² Id.
⁴ James R. Maxeiner, Standard-Terms Contracting the Global Electronic Age: European Alternatives, 28 Yale J. Int’l L. 109, 171-72 (2003);
Unfair Contract Terms Directive (UCTD) explicitly protects consumers by invalidating any contract that binds consumers to terms absent an opportunity to review its terms before the contract’s formation. The simple fact that courts and legislators in the United States enforce and generally favor arbitration agreements and forum-selection clauses clearly validates the concern expressed by scholars regarding the potential problems of American browsewrap agreement enforceability in Europe.

However, the pattern of the actions taken by the courts in the United States generally shows that, despite arguments to the contrary, there is a level of consumer protection involved in the narrow context of browsewrap agreements. The cases in which browsewrap agreements are unenforceable typically involve a contract between a business and a consumer. These cases also concern facts in which the browsewrap agreement was the sole source of notice that legally binding terms were present. In contrast to the UCTD’s approach of analyzing the terms used and determining whether or not the terms are unfair, these American courts tend to find browsewrap agreements unenforceable through an analysis of whether or not a contract

5 Id. 134-36.
6 For example, in AT&T v. Concepcion, 131 S.Ct. 1740, the United States Supreme Court upheld a class action waiver and binding arbitration agreement against a class of consumers. See generally AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
8 Id.
9 Lemley, supra note 3 at 464.
10 Id. at 462. But see Briceño v. Sprint Spectrum, 911 So.2d 176, 178 (Fla. Dist. Ct. App. 2005), Hubbert v. Dell Corp., 835 N.E.2d 113, 125, 126 (Illinois App. Ct., 5th Cir. 2005), Motise v. Am. Online, Inc., 346 F. Supp. 2d 563, 566 (S.D.N.Y. 2004). While the courts in these cases do enforce browsewrap agreements in these cases, they do so because the formation of the contract and notice on the websites are undisputed. For example, the plaintiff in Briceño stipulates that he agreed to the Terms of Use but argued that the arbitration clause within it was unconscionable. Briceño, at 178. As mentioned several times in this note, unconscionability is not sufficient means to battle a browsewrap agreement and is the reason why courts choose to discuss the formation of the contract in its entirety instead.
was formed.\textsuperscript{12} Despite using differing means to invalidate browsewrap agreements, the American courts are coming to the same conclusions as European courts when facing the question of browsewrap agreement enforceability by favoring consumer protection over contract enforcement.\textsuperscript{13}

This note intends to discuss and analyze this narrow exception to the broad—and generally correct—presumption that the European legal system does a better job of protecting consumers than the United States.\textsuperscript{14} While there is no indication that courts in the United States are purposely adopting the policing strategies of unfair consumer contracts set forth in the UCTD, this conclusion is especially desirable regarding browsewrap agreements. By doing so, the American courts’ approach resolves concerns of international enforcement of contracts, at least in the case of browsewrap agreements, and additionally, offers consumers protection from unwanted contracts. Further, American courts are setting a precedent of invalidating browsewrap agreements between consumers and businesses. This precedent provides a level of consistency, which has the ability to aid global commerce and, more importantly, deter consumer-based businesses from using browsewrap agreements as the sole source of contractual notice.

To best discuss the heightened consumer protection that American courts apply regarding browsewrap agreement issues and its similarity to the consideration of consumer protectionism already required by the UCTD in Europe, Section II will first establish the foundation of this analysis by discussing the specifics of what a browsewrap agreement is. As further foundational background, Section III will discuss the state of consumer protectionism

\textsuperscript{12} Maxeiner, \textit{supra} note 1 at 118-19, 134-35. See also Lemley, \textit{supra} note 3 at 463 (noting that “economic entities are unlikely to persuade a court that a term is unconscionable”).

\textsuperscript{13} Lemley, \textit{supra} note 3 at 462. See also Nguyen v. Barnes & Noble, Inc., No. 12–56628, 2014 WL 4056549, at *6 (9th Cir. 2014).

regarding contract enforcement generally in the United States and Europe today. Next, Section IV will look at specific cases to illustrate the common patterns that exist in American courts in browsewrap agreement cases. Most importantly, this section will include a discussion of three specific cases that show how courts have favored consumer protection over standard contract enforcement in cases involving browsewrap agreements. Lastly, Sections V and VI will summarize the possible implications of these court decisions and ultimately conclude that whether or not consumer protection is needed in other contexts—as seen with the UCTD—this heightened protection is necessary at least in the case of browsewrap agreements.

II. What is a Browsewrap Agreement?

A browsewrap agreement usually consists of a hyperlink at the bottom or top of a web page under the guise of “legal terms” or “terms of use.” Typically, this hyperlink is highlighted in a different color from the background and the actual terms cannot be seen without first clicking on the hyperlink. Once a consumer finds the hyperlink and clicks the link, the consumer will usually be redirected to a completely different web page where the actual purportedly binding terms may be found. One logical reason for calling this a “browsewrap” agreement is that one must actually browse a web page to find it. Another equally likely reason for its name is that the conduct of browsing serves as assent to the contractual terms under the implied-in-fact principle. Because consumers are not typically browsing for legal terms when they are using a business’s website, it is difficult for courts to pinpoint an exact moment of assent or notice that is required by a traditional analysis of contract formation.

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15 Rambarran & Hunt, supra note 1 at 176.
16 Id.
17 Id.
18 Block, supra note 3 at 230.
19 Rambarran & Hunt, supra note 1 at 178.
20 Lemley, supra note 3 at 464-65 (noting that “in today’s electronic environment, the requirement of assent has withered away to the point where a majority of courts now reject any requirement that a party take any action at all demonstrating agreement to or even awareness of terms in order to be bound by those terms”).
An important part of understanding the uniqueness of the browsewrap agreement is understanding its predecessor, the click-through agreement. Also known as a clickwrap agreement, this type of agreement conspicuously presents the terms to a consumer and requires a consumer to click on an icon, usually explicitly stating “I accept” or “I agree”, to indicate acceptance.21 Unlike its successor, the browsewrap agreement, the points of offer and assent in click-through agreements are easily identifiable and therefore, fit easily into the traditional analysis of contract formation.22 Acceptance implied through the browsing of the web page rather than the affirmative action of accepting the terms raises difficult issues because consumers are not required to view the license before accepting the terms.23 Despite the conspicuousness of offers and acceptances in click-through agreements, click-through agreements were challenged in a vigorous series of cases in every circuit.24 Today however, click-through agreements are generally enforceable.25 Similarly, browsewrap agreements have also been challenged in various cases in different circuits. However, in contrast to the ultimate result of click-through agreement challenges, recent court decisions regarding browsewrap agreements suggest that browsewrap agreements involving consumers will generally be found unenforceable in the future.26

The higher likelihood of binding consumers to unwanted contracts through browsewrap agreements does not completely absolve browsewrap agreements of their usefulness. The usefulness of browsewrap agreements is comparable to the usefulness of any other type of

21 Rambarran & Hunt, supra note 1 at 174.
22 Id. at 177.
23 Zynda, supra note 3 at 504.
24 Michelle Garcia, Browsewrap: A Unique Solution to the Slippery Slope Of the Clickwrap Conundrum, 36 Campbell L. Rev. 31, 40 (2013).
26 See Nguyen v. Barnes & Noble, Inc., No. 12–56628, 2014 WL 4056549, at *6 (9th Cir. 2014) (finding a browsewrap agreement unenforceable “in keeping with courts' traditional reluctance to enforce browsewrap agreements against individual consumers”).
standard forms contract. For example, standard form contracts provide businesses that are repeat players in commercial transactions the option to efficiently make and fulfill contractual obligations without having to negotiate every term of a contract. Section 2-302 of the Uniform Commercial Code (U.C.C.) provides default rules to supplement these types of business negotiations and to also efficiently solve contractual disputes when they arise. Browsewrap agreements are similarly useful because this type of agreement allows businesses to use websites owned by other businesses for their benefit without having to negotiate specific terms before doing so. Like the standard terms guided by the U.C.C., browsewrap agreements are more beneficial for agreements between two businesses. Based on the usefulness of standard forms in business, Mark Lemley suggests in his article Terms of Use that browsewrap agreements should only be enforced “against sophisticated commercial entities who are repeat players.” Since the publication of Lemley’s article in 2006, courts continue to follow this pattern of generally enforcing browsewrap agreements when the parties are each a business.

While a full discussion of browsewrap agreement enforceability in business-to-business contracts is beyond the scope of this article, the continued pattern of courts enforcing browsewrap agreements when both parties are businesses, in contrast to not enforcing

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27 Lemley, supra note 4 at 472. See also Garcia, supra note 23 at 39-40 (stating “a tension exists between the classic legal requirement of notice and the design of websites because websites, by their nature, attempt to be user-friendly, providing ease of access without bothering users by quoting jarring legal information. Website contracts are thus following the trend of a majority of paper contracts that have resorted to form language”).
28 Maxeiner, supra note 4 at 117-18.
29 Id. at 116 (discussing the concept of “blanket assent” and how this concept dominates American treatment of standard forms).
30 Id. at 472.
31 Id. at 464.
32 See e.g., Sw. Airlines Co. v. BoardFirst, L.L.C., 3:06-CV-0891-B, 2007 WL 4823761 (N.D. Tex. Sept. 12, 2007); Snap-on Business Solutions Inc. v. O’Neil Associates, Inc., 708 F.Supp.2d 669 (N.D. Ohio 2010). But see Traton News L.L.C. v. Traton Corp., et. al., 914 F.Supp.2d 901 (S.D. Ohio 2012) (holding that a browsewrap agreement between two businesses was unenforceable because in contrast to other browsewrap cases such as Snap-on, the website visitor did not obtain a benefit from using the site—rather, the plaintiff only visited the site to view negative material that was being posted on the site about its company in order to protect its reputation).
browsewrap agreements when one of the parties is a consumer, further illustrates how American courts are favoring consumer protection over contract enforcement.

III. Consumer Protectionism in Contract Law

As previously alluded to, consumer protection is approached differently in the United States compared to the European Union. First, Section III.A. will discuss how American legal theory approaches contract enforcement generally—the trend being that contracts will be enforced unless there is clear foul play or unfairness in the bargaining process. Section III.B. will then discuss the European Union’s Unfair Contract Terms Directive, which in contrast, presumes certain terms are unfair and if used in a contract will make a contract unenforceable, without regard to whether or not the bargaining process was fair. A comparison of consumer protection in Europe and the United States illustrates how in the case of browsewrap agreements between consumers and commercial businesses, American courts are paralleling the concerns set forth by the Directive. In doing so, American courts are rightfully acknowledging a heightened need for consumer protection where historically, the freedom to contract typically triumphed.

A. Consumer Protection in the United States

Generally, contract law in the United States is based on the freedom to contract principle.\(^33\) Because the freedom to contract principle is so highly valued in the United States, courts are reluctant to police contract terms and instead, police the bargaining process.\(^34\) In other words, as long as a consumer had the opportunity to read and review contractual clauses, courts are likely to defer to the terms of a contract.\(^35\) The fact that browsewrap agreements are potentially enforceable without having to review the terms—or even knowing they are present—illustrates why browsewrap agreement disputes cause tension between the desire for courts to

\(^33\) Maxeiner, \textit{supra} note 4 at 113.
\(^34\) Rustad & Onufrio, \textit{supra} note 7 at 1149.
\(^35\) \textit{Id.} at 1190.
uphold the freedom to contract principle and the need for courts to consider the realities of consumer-to-business relations and expectations. 36

One possible way a court may invalidate a contract is by finding a contract to be unconscionable. Unconscionability serves as a defense against enforcing a contract on the grounds that a contract is “excessively unfair.” 37 Several tests have been proposed in an attempt to guide courts in the policing of consumer contracts and establish a predictive mechanism in finding unconscionability. 38 One example of such a test is the “reasonable expectations test” which simply “invalidates a term that lies outside what a party might reasonably expect.” 39 However, there is not a generally accepted test and the fact-specific nature of these decisions disables the development of helpful case precedent. 40

Unfortunately for consumers, unconscionability is very difficult to prove for several reasons. One reason is that courts commonly require that both procedural (inequality in the bargaining process) and substantive (harsh and excessively unfair terms contained in the contract) unconscionability be shown. 41 The browsewrap agreement format offers evidence of procedural unconscionability because consumers may not be aware that a contract even existed based on the hyperlink’s location and format. However, it is much more difficult for a consumer in a browsewrap agreement issue to satisfy the substantive unconscionability prong. 42 As the cases discussed in Section IV will show, the terms of the browsewrap agreements are typically standard terms that one may find in any other contract—just on the internet instead of on

36 Garcia, supra note 24 at 39-40
37 Id. at 41.
38 Id. at 120.
39 Id.
40 Id. at 199-20.
41 Maxeiner, supra note 4 at 118.
42 Rustad & Onufrio, supra note 7 at 1136.
paper.\textsuperscript{43} Therefore, the unconscionability doctrine does little to assist consumers faced with surprising and oppressive legal terms in browsewrap agreements.

Another reason why it is very difficult for consumers to prove unconscionability is that while the unconscionability doctrine's purpose is to “prevent oppression and unfair surprise,” according to the U.C.C.,\textsuperscript{44} the U.C.C.'s doctrine of unconscionability only applies where the consumer is left without a meaningful choice.\textsuperscript{45} With so many options for consumers to choose from on the Internet, this threshold would be difficult for any average consumer to prove in court.

The difficulty of proving unconscionability has led American courts to analyze browsewrap agreement disputes by using other means to protect consumers. Instead of studying the actual terms of the contract, the courts look to whether or not a contract was formed in the first place. This analysis differs from an unconscionability analysis because the courts do not look at the terms of the contract at all. Rather, the courts look to whether the notice of the browsewrap agreement was conspicuous enough to show that the consumer should have known about it.\textsuperscript{46} In addition, this type of case analysis also does a better job of providing helpful precedent for future cases—which is clearly evident as shown by the courts’ pattern of not enforcing browsewrap agreements involving consumers.\textsuperscript{47}

\textbf{B. Consumer Protection in Europe: The Unfair Terms Directive}

In contrast to the United States’ emphasis on the freedom to contract, “Europeans recognize that there is no freedom of contract when it comes to standard-form consumer


\textsuperscript{44} Rustad & Onufrio, \textit{supra} note 7 at 1149-50 (quoting §2-302 of the U.C.C.).

\textsuperscript{45} \textit{Id.} at 1136 (noting that this is a very difficult threshold to obtain).

\textsuperscript{46} Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 31 (2d Cir. 2002).

contracts.” The validity of this statement is most evident in the development of European Union’s Unfair Contract Terms Directive (UCTD).

In November of 1976, the Council of Europe adopted Resolution (76) 47 on Unfair Terms in Consumer Contracts and an Appropriate Method Of Control.” The accompanying explanatory memorandum found standard terms problematic for consumers since individual consumers rarely negotiate the terms of the contract and rarely have the power to sufficiently protect their own bargaining interests. Stemming from early proposals such as Resolution 47, the final version of the UCTD was adopted in April of 1993 and is part of a larger initiative to protect consumers. The creation of this legislation shows that the heightened policing of consumer contracts in Europe is based on the presumption that standard contracts in and of themselves are highly unequal. This legislation further illustrates how skepticism of government regulation is weighed differently in Europe compared to the United States. Where an American might see control of standard terms as government meddling in relations between private parties, a European might see a lack of legislative protection as “government toleration of exploitation of one private party by another.”

The biggest implications of this differently weighed skepticism is that E.U. consumers cannot waive their mandatory rights and remedies regardless of whether or not the consumers read terms of use clauses that are commonly found in browsewrap agreements. Therefore, the analysis of whether or not a browsewrap agreement is conspicuous enough performed by courts

48 Rustad & Onufrio, supra note 7 at 1189.
50 Maxeiner, supra note 4 at 131-32.
51 Id. at 132.
52 Id. at 133.
53 Id. at 172.
54 Rustad & Onufrio, supra note 7 at 1185.
in cases discussed in Section IV is irrelevant in the approach taken under the UCTD.\textsuperscript{55} However, the ultimate conclusions of the courts in these U.S. cases involving consumers—though through different means—still reach the same conclusion that a European court would in the same circumstances by not enforcing the browsewrap agreement against consumers.

More importantly, in the narrow case of browsewrap agreements, American courts in these cases are falling within the standards enforced by the UCTD. Directives serve as instructions to Member States to adopt laws with particular content.\textsuperscript{56} While the intended result of the instructions is binding, means of achieving this result are not.\textsuperscript{57} The UCTD, as a Directive, sets out minimum standards to ensure a “maximum degree of protection for the consumer,” while allowing Member States to adopt more stringent provisions.\textsuperscript{58} The intended result of the UCTD is made clear in the UCTD’s preamble:

Whereas persons or organizations, if regarded under the law of a Member State as having a legitimate interest in the matter, must have facilities for initiating proceedings concerning terms of contract drawn up for general use in contracts concluded with consumers, and in particular unfair terms, either before a court or before an administrative authority competent to decide upon complaints or to initiate appropriate legal proceedings...\textsuperscript{59}

Thus, the UCTD recognizes the right of European courts to police unfair contract terms.\textsuperscript{60} The UCTD applies broadly but is limited only to non-negotiated contracts between professionals and consumers.\textsuperscript{61} The UCTD further requires that ambiguities in any contract be interpreted in favor of consumers.\textsuperscript{62} Similarly, the cases discussed in Section IV will illustrate the United States’ courts reluctance in enforcing browsewrap agreements when: (1) The contract is between a consumer and a business; and (2) There is any potential for a consumer to overlook the

\textsuperscript{55} Id.
\textsuperscript{56} Maxeiner, supra note 4 at 131.
\textsuperscript{57} Id. at 133-34.
\textsuperscript{58} Id.
\textsuperscript{59} Council Directive 93/13, supra note 49 at 31 (emphasis added). See also Rustad & Onufrio, supra note 7 at 1134.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 1134-35.
existence of a browsewrap agreements based on its location and colors used for the text and background.\textsuperscript{63} The United States' courts eagerness to find any flaw in a hyperlink's design and location is similar to the UCTD’s requirement of favoring consumers when a contract contains any ambiguities.

Before moving on to the case discussion, it is important to highlight several provisions of the UCTD that are equally identifiable and applicable to the cases in Section IV.

- Article 3(1) of the UCTD requires that a contract term is unfair “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”\textsuperscript{64}
- Article 6(1) provides that “unfair terms” are not binding on consumers in contracts with sellers or suppliers.\textsuperscript{65}

The Annex of the UCTD lists several types of terms that may be considered unfair.\textsuperscript{66} Item (i) and Item (q) are of particular significance here because of their potential influence on issues regarding browsewrap agreements.\textsuperscript{67}

- Item (i) provides that a term may be found unfair if it has the effect of irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.\textsuperscript{68}
- Item (q) calls for evaluating a term “excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.”\textsuperscript{69}

Keeping these provisions in mind, Section IV will illustrate how courts in the United States are protecting consumers by finding browsewrap agreements unenforceable in cases that involve contracts between consumers and businesses. While courts in the United States are enforcing browsewrap agreements in other instances, such as those involving contracts between

\textsuperscript{64} Council Directive 93/13, supra note 49 at Art. 3(1). See also Maxeiner, supra note 4 at 134.
\textsuperscript{65} Council Directive 93/13, supra note 49 at Art. 6(1). See also Maxeiner, supra note 4 at 134.
\textsuperscript{66} Council Directive 93/13, supra note 49 at 33. See also Maxeiner, supra note 4 at 135
\textsuperscript{67} Maxeiner, supra note 4 at 135-36 (noting that Item(i) is of particular significance with clickwrap agreements).
\textsuperscript{68} Council Directive 93/13, supra note 49 at 33. See also Maxeiner, supra note 4 at 135-36.
\textsuperscript{69} Council Directive 93/13, supra note 49 at 33. See also Maxeiner, supra note 4 at 136.
two businesses, this limitation is analogous to the limitation set by the UCTD since this Directive is also only binding on contracts involving consumers and non-negotiated terms. Further, because the UCTD does not impose specific means to achieve this goal of consumer protection, Section IV will further illustrate how American courts are working within the standards imposed by the UCTD and meeting this Directive’s purpose of consumer protection in regards to the enforceability of browsewrap agreements.

IV. The Treatment of Browsewrap Agreements in the United States

The cases in which the American courts illustrate a heightened need for consumer protection regarding browsewrap agreements follows the same fundamental pattern. First the parties in these cases were consumers and challenged the browsewrap agreements enforceability as a whole, rather than a specific clause. Second, this challenge was based on the inability to assent to the terms since the consumer was never put on notice that the contract even existed. Third, when analyzing the browsewrap agreement, the courts considered several factors, such as the coloring of the hyperlink, the location of the hyperlink, and how many steps it takes to actually get to the legally binding terms. For example, in Van Tassel v. United

70 See Nguyen v. Barnes & Noble Inc., 763 F.3d 1171 (9th Cir. 2014) (holding “where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice”), In re Zappos.com, Inc., Customer Data Sec. Breach Litig., 893 F. Supp. 2d 1058 (D. Nev. 2012) (concluding “Without direct evidence that Plaintiffs click on the Terms of Use, we cannot conclude that Plaintiffs ever viewed, let alone manifested assent to, the Terms of Use”), Van Tassell v. United Mktg. Grp., LLC, 795 F. Supp. 2d 770 (N.D. Ill. 2011) (finding the plaintiff’s “failure to scour the website for the Conditions of Use she had no notice existed does not constitute assent”), Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362 (E.D.N.Y. 2009) (concluding the plaintiff lacked both actual and constructive notice because “the website did not prompt her to review the Terms and Conditions and because the link to the Terms and Conditions was not prominently displayed so as to provide reasonable notice of the Terms and Conditions”), Specht v. Netscape Commc’ns Corp., 306 F.3d 17 (2d Cir. 2002) (concluding “where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms”).
Marketing Group, Inc., the court takes time to identify each step it takes to finally get to the actual terms of the agreement:

[Instead of merely scrolling down to find the terms on a submerged screen when there was no reason to do so, the users of ChefsCatalog.com, also without any reason to do so, must scroll down the home page, make the illogical leap that “Customer Service” means binding “Conditions of Use” and click on that link. They must next scroll down a lengthy page containing unrelated information to find the Conditions of Use, or click on the “Conditions of Use, Notice & Disclaimers” link sandwiched between “Price Adjustments” and “CHEFS Gift Card & Product Giveaway” links...]

Most importantly, the circumstances of these cases are specifically distinguishable from other types of online cases concerning online contractual agreements because the agreement is not accompanied by a printed contract, a confirming letter agreement incorporating the provision by reference, or a required click-through agreement. Therefore, the Courts in these cases found that a browsewrap agreement, without additional notice of legally binding terms on the website, is insufficient to bind consumers. As noted in *Hines v. Overstock.com, Inc.*, “very little is required to form a contract nowadays, but this [browsewrap agreement] alone does not suffice”. In doing so, these courts chose to favor consumer protection over contract enforcement. Three specific cases that illustrate how courts are protecting consumers under these circumstances are discussed below in detail to further illustrate how the court applies this analysis to avoid browsewrap agreement enforcement.

The fact that the plaintiffs are consumers in these cases is also an important factor to consider. Although courts in these cases do not address that factor directly, there is a notable difference between the American courts’ treatment of browsewrap agreements when it involves a contract between two businesses and a contract between consumers and a business. In his

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72 Jerez v. JD Closeouts, LLC, 943 N.Y.S.2d 392, 398 (N.Y. Dist. Ct. 2012). See also Fteja v. Facebook, Inc., 841 F. Supp. 2d 829 (S.D.N.Y. 2012) (finding that the Terms of Use “were not exactly a true browsewrap license” because the sign up page indicated the additional action of signing up would manifest agreement to the Terms of Use).
74 Lemley, *supra* note 3 at 462.
article, *Terms of Use*, Mark Lemley highlights this differential treatment and notes, “virtually all of the courts that have refused to enforce a browsewrap license have done so to protect consumers.” It is important to note that *Terms of Use* is cited by three cases discussed below. Although the article is cited for the purpose of suggesting that courts may be willing to overlook the absence of assent when there are reasons to believe that the consumer was aware of the terms, it is relevant that courts are citing to an article in which the author’s ultimate suggestion is, “if courts enforce browsewraps at all, enforcement should be limited to the context in which it has so far occurred—against sophisticated commercial entities who are repeat players.”

### A. The Enforcement of Browsewrap Agreements: Business-to-Business

There are obvious reasons to believe that a business is in a better position than consumers in anticipating the possibility that they are bound by legal terms when they browse a website. For example, when a sophisticated business entity is accessing another company’s website, it is more than likely that they have accessed similar websites before. In addition, it is likely that employees of this business are accessing other companies’ websites every day and are “agreeing” to dozens, hundreds, or thousands of contracts on a daily basis. Therefore, these are exactly the type of conditions that standard terms were developed for and that the §2-
302 of the U.C.C. was designed to govern. Consumers on the other hand are not as likely to be aware that a contract has anything to do with their transaction if the terms are not conspicuously introduced because unlike businesses, consumers are not typically employing their own terms of use during these transactions.

In his article, Lemley identifies the common characteristics of the fact pattern of cases in which the courts have enforced browsewrap agreements. The common characteristics include, a defendant that is a smaller company and typically a competitor who repeatedly accesses the plaintiff’s website. Further, the defendant in these cases may or may not be aware of the terms of use on the plaintiff’s website but the defendant is usually aware that the plaintiff objects to the defendant’s use of the site. In an effort to compare and contrast the later cases in which the court favors consumer protection, briefly described below are three cases in which the court reasoned that the browsewrap agreement was enforceable.


The parties in this case were two online businesses. This suit involved three claims, only one of which—the breach of contract claim—is relevant to this discussion of browsewrap agreement enforceability. The plaintiff, Pollstar, alleged that the defendant, Gigmania, breached a contract located in the form of a browsewrap agreement when Gigmania copied information from Pollstar’s website and placed it on its own site. Gigmania contended that the breach of contract claim failed as a matter of law because there was never a contract due to

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81 Lemley, *supra* note 2 at 472 (stating “the standard-form contract is designed for circumstances in which one party is in control of the transaction, is a repeat-player and has an interest in setting the terms”).

82 *Id.* at 477.

83 *Id.* at 472.

84 *Id.*

85 *Id.*


87 *Id.* at 978.
the lack of mutual consent. In response, Pollstar argued that Gigmania consented to the terms of the License Agreement by clicking on the access button to retrieve the information Gigmania later posted on its own site.

To determine whether or not the contract should be enforceable, the court discussed the location and coloring of the terms of use link. In this case, the notice that “use is subject to license agreement” was in small gray print on a gray background. In addition, the agreement was not located on the homepage. Rather, it was located on a separate page that was linked to the homepage.

Throughout this analysis, the court sounds like it is going to favor Gigmania and not enforce the terms of the browsewrap agreement. For example, early on in the discussion the court states, “[v]iewing the web site, the court agrees with the defendant that many visitors to the site may not be aware of the license agreement.” A few paragraphs later, the court notes that site users may be unaware that the license agreement is even linked to another page because the text of the hyperlink is not underlined, “a common Internet practice to show an active link.”

Despite these statements and the court’s express agreement with Gigmania that the user is not immediately confronted with the notice of the license agreement, the court held that “the browsewrap agreement may be arguably valid and enforceable.” It is important to note that cases discussed in Section IV.B in which courts find contracts to be unenforceable involving

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88 Id. at 980-81.
89 Id. at 977.
90 Id. at 980-81.
91 Id. at 981.
92 Id.
93 Id.
94 Id. at 980-81.
95 Id. at 981.
96 Id. at 982.
consumers contain browsewrap agreements that are much more conspicuous than the hyperlink in the present case.\(^97\)

It is also important to note that the court was hesitant in declaring the unenforceability of browsewrap agreements because no reported cases had ruled on the enforceability of a browsewrap agreement at this time.\(^98\) In making its decision, the court relied on the case *ProCD v. Zeidenberg*, in which the Seventh Circuit enforced a “shrinkwrap” software license agreement that was enclosed in the product and appeared on the user’s screen every time the software was used.\(^99\) Whether or not the court intentionally found the contract enforceable because Gigmania is a business is impossible to determine, but compared to the fact-pattern of cases involving consumers, *Pollstar* illustrates a substantially stricter contract enforcement policy.

2. *Cairo, Inc. v. Crossmedia Services, Inc.*

Crossmedia Services (CMS) is an Internet business that enables their retail customers to distribute their promotional information via the Internet to shoppers.\(^100\) In addition, this site enables shoppers to identify sales and specials from these retailers.\(^101\) The plaintiff, Cairo, Inc., is also an Internet business.\(^102\) Cairo compiles information using computer programs commonly referred to as “robots,” “spiders,” or “crawlers,” which automatically visit retailers’ weekly

\(^97\)For example, the hyperlinks in *Nguyen v. Barnes & Noble, Inc.* are located on the bottom left-hand corner of every page and appear in underlined green typeface. *Nguyen v. Barnes & Noble, Inc.*, No. 12–56628, 2014 WL 4056549, *at 2 (9th Cir. 2014).

\(^98\)Id. at 982.


\(^101\)Id.

\(^102\)Id. at 2.
circular web pages, some of which are enabled by CMS.\textsuperscript{103} These programs then return that information to Cairo’s database.\textsuperscript{104}

Upon discovery of Cairo’s actions, CMS’s counsel sent a letter to the President and Vice President of Cairo stating that Cairo’s actions constituted a breach of contract of the Terms of Use located in a browsewrap agreement on the CMS site.\textsuperscript{105} Cairo subsequently filed an action against CMS in the United States District Court for the Northern District of California. In response, CMS filed a Motion to Dismiss for improper venue based on the forum selection clause located in CMS’s terms of use.\textsuperscript{106} The computer programs used by Cairo to scan the CMS site were not capable of reading the Terms of Use on the CMS site.\textsuperscript{107} Therefore, Cairo argued that Cairo never assented to the Terms of Use and the forum selection clause located within it.\textsuperscript{108}

The Court ultimately held that the browsewrap agreement was enforceable.\textsuperscript{109} One fact that makes this case noticeably different than the others discussed here is that Cairo admitted to actual knowledge of CMS’s Terms of Use, “at least the day before CMS sent its letter threatening legal action.”\textsuperscript{110} Therefore, Cairo explicitly admitted that it was aware of the terms when they continued to use the site. However, the court also noted that even before Cairo received notice of CMS’s cease-and-desist letter, Cairo’s repeated use of CMS’s website “can form the basis of imputing knowledge to Cairo of the terms on which CMS’s services were offered.”\textsuperscript{111} The court’s reasoning is based on Cairo’s assent via imputed knowledge is analogous to Lemley’s argument in his article, \textit{Terms of Use}.\textsuperscript{112} Cairo’s continued use of CMS, and other similar sites, in addition to the fact that the use of these sites is a critical part of Cairo’s

\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 3.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 5.
\textsuperscript{110} Id. at 4.
\textsuperscript{111} Id. at 5.
\textsuperscript{112} Lemley, \textit{supra} note 3 at 477.
business, illustrates that the business should have known that there was possibly a browsewrap agreement present.

3. Southwest Airlines Co. v. BoardFirst, L.L.C

As in the previous two cases discussed, the parties here are two businesses. Southwest is an airline company that provides early check-in for customers on a first come, first serve, basis.\textsuperscript{113} The earlier a customer checks in, the more likely that customer obtains an “A” boarding pass: a ticket that allows the first forty-five customers to board first.\textsuperscript{114} BoardFirst allows Southwest customers to pay BoardFirst to obtain “A” boarding passes on their behalf.\textsuperscript{115} Upon discovery of BoardFirst’s business, Southwest Airlines sent several cease-and-desist letters to BoardFirst.\textsuperscript{116} When BoardFirst did not cease using the Southwest Airlines site to conduct its business, Southwest filed for breach of contract due to violation of the terms of use located in a browsewrap agreement on the Southwest site.\textsuperscript{117}

The terms of use was in small black print at the bottom of the page and specifically stated, “Unless you are an approved Southwest travel agent, you may use the Southwest web sites and any Company Information only for personal, non-commercial purposes.”\textsuperscript{118} Southwest even changed these terms after discovering BoardFirst’s actions by adding, “For example, third parties may not use the Southwest web sites for the purpose of checking Customers in online or attempting to obtain for them a boarding pass in any certain boarding group.”\textsuperscript{119}

In addressing the breach of contract issue, the court first had to establish whether or not a valid contract was formed under the terms of use located in the browsewrap agreement.\textsuperscript{120}

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 4.
\textsuperscript{117} Id. at 2.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 4.
The court ultimately held that the browsewrap agreement was enforceable and echoed the court's reasoning in *Cairo* by noting that even though there is no dispute that BoardFirst had actual knowledge of Southwest's Terms of Use due to the received cease-and-desist letter, BoardFirst assented prior to receiving this letter through continued use of the site in connection with its business.¹²¹

As evidenced in both *Cairo* and *Southwest*, there is very little analysis of what the actual hyperlink and Terms of Use look like and where the terms are located. Instead, the court focused on the nature of the business's actions and the imputed knowledge that accompanies the nature of their businesses. As evidenced by the cases in Section IV.B, the focus on the details of the browsewrap agreement is more thoroughly analyzed in cases that involve contracts between consumers and businesses. This shift in analysis possibly indicates that the courts care about the point of notice and assent in contracts involving consumers more than a consumer's reason for visiting the site or whether the consumer should be aware that a contract is present based on past experience.¹²²

Another similarity between *Cairo* and *Southwest* is that the court evaluated whether or not the facts of the case were more similar to *Verio*, in which the court held that the browsewrap agreement was enforceable, or *Specht*, in which the court held that the browsewrap agreement was unenforceable in reaching its decision.¹²³ The courts in both *Southwest* and *Cairo* found the facts were more similar to *Verio* than *Specht* because in both cases Cairo and BoardFirst assented to the Terms of Use by making the decision to use the website to benefit their businesses. Both courts found using the website for their own benefit constituted acceptance of

¹²¹*Id.* at 7.
the Terms. The Cairo and Southwest court opinions distinguish those cases from Specht because the parties in those cases had actual knowledge of the Terms of Use due to receiving cease-and-desist letters. While the courts in Cairo and Southwest do not state that the difference between Specht and Verio is that one was an action filed by a consumer and another was brought by a business, the facts of each case along with the facts in Southwest and Cairo illustrate how a business is typically in a better position than consumers when it comes to these agreements. This is emphasized by the fact that both courts in Cairo and Southwest noted that even before the cease-and-desist letters were sent, both companies had already assented to the Terms of Use by continual use of the site.

B. Protecting Consumers: The Policing of Browsewrap Agreements

As seen in the previous section, courts generally conclude that because of a business’s repeated interaction with a website, the business was aware of the Terms of Use in a browsewrap agreement even though it never affirmatively assented to those terms. The court decisions in the cases discussed below come to the opposite conclusion. Instead, these courts focus more on the location and design of the browsewrap agreement to protect consumers from unknowingly assenting to contractual terms.

Recalling the relevant provisions and the minimum standards set by the UCTD discussed previously in Section III, the courts in the cases below differ in the means set forth by Articles 3(1) and 6(1) and Items (i) and (q) of the Annex by analyzing the form of the

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127 Id. at 472-73.
browsewrap agreement itself rather than the terms actually contained within the agreement. Despite this different analysis, the American courts use these alternative means to protect consumers and relay the same policy concerns expressed in UCTD provisions. The following three cases are examples of how American courts tend to approach the enforceability of browsewrap agreements involving consumer parties and how the court’s intent to protect consumers has become increasingly obvious since Specht v. Netscape Communications Corp. up until the much more recent case of Nguyen v. Barnes & Noble.

1. Specht v. Netscape Communications Corp.

This action was brought by several consumers who encountered the Netscape website in differing situations.\(^{128}\) The majority of the plaintiffs downloaded a computer program called SmartDownload while simultaneously downloading another program called Communicator on the Netscape website.\(^{129}\) The plaintiffs were not permitted to download Communicator without first clicking “yes” to a clickwrap agreement, which contained the license agreement.\(^{130}\) This agreement never mentioned the SmartDownload program and explicitly stated, “These terms apply to Netscape Communicator and Netscape Navigator.”\(^{131}\) These terms also contained an arbitration clause.\(^{132}\)

Following the Communicator download, these plaintiffs were confronted with an additional webpage that urged them to “download with confidence using SmartDownload.”\(^{133}\) Unlike the Communicator download however, these plaintiffs were not confronted with a clickthrough agreement.\(^{134}\) Instead, to read the terms of Smartdownload’s license agreement,

\(^{128}\) Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 22 (2d Cir. 2002).
\(^{129}\) Id.
\(^{130}\) Id.
\(^{131}\) Id.
\(^{132}\) Id.
\(^{133}\) Id.
\(^{134}\) Id.
the consumers were required to first scroll down the page and access two webpages.\textsuperscript{135} These terms also included an arbitration clause.\textsuperscript{136}

In the form of three related putative class actions, Plaintiffs alleged that through their use of SmartDownload, the Defendant received private information about the plaintiffs’ Internet downloading and thereby acted as electronic surveillance of their activities.\textsuperscript{137} The plaintiffs further alleged that this surveillance violated two federal statutes, the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act.\textsuperscript{138} In response, the Defendant compelled arbitration in accordance with the Terms of Use that existed in the browsewrap agreement on their site.\textsuperscript{139}

In their argument to compel arbitration, the Defendant alleged that the plaintiffs were put on notice of the agreements since the existence of the license terms were located on the next scrollable screen.\textsuperscript{140} While the position of a scroll bar may indicate that the consumer has not explored the entirety of a page, the court found the location of the scroll bar does not sufficiently indicate that the plaintiffs should have reasonably concluded that the unexplored portion contained a notice of the license terms.\textsuperscript{141} Therefore, the court concluded that, “in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.”\textsuperscript{142}

While the location of the hyperlink and the context by which the consumers were prompted to download SmartDownload are thoroughly discussed by the court, the terms

\begin{flushleft}
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 21.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 30.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 32.
\end{flushleft}
actually contained inside the agreement are never mentioned. This fact illustrates how the court veers around the issue of unconscionability and directly focuses on whether or not there was notice and assent. This fact also illustrates how the analysis by American courts differs from the standards set by the UCTD, which bases its analysis on the terms alone. Ultimately however, this court reaches the desired results required by the UCTD by protecting a group of consumers from being bound to an arbitration clause. As previously mentioned, the UCTD does not require any specific means to reach this result; the UCTD only requires that this result be reached.

In addition, this court suggests that the circumstances of SmartDownload’s prompt indicate an unfair disadvantage for consumers. In its conclusion the court states that the browswrap agreement is unenforceable because the website “urges” consumers to click and download the SmartDownload software. While the placement of the download offer may have certainly “urged” consumers to download, there is no indication that the consumer had no other choice but to consent to the download as required by the American unconscionability doctrine. In this case, the consumer had the clear and easy choice to not click the download button. However, because of the download button’s placement and the ambiguous placing of the binding legal terms that accompanied it, the court here chose to avoid the discussion of whether or not the consumers had a choice by finding a complete lack of notice overall.

It is also significant that the court could have favored the defendant Netscape in its consideration of the circumstances since it is arguable that the consumers should have known a contract was probably in place by notice of the previous clickthrough agreement.

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143 See generally, Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 22 (2d Cir. 2002).
144 Rustad & Onufrio, supra note 7 at 1185.
146 Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 32 (2d Cir. 2002).
147 Id.
148 Rustad & Onufrio, supra note 7 at 1136.
149 Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 22 (2d Cir. 2002).
extent that the court did look to the terms of the contract, the court overlooked this basis since the terms of the clickthrough agreement only included Netscape Communicator and Netscape Navigator in its terms.\textsuperscript{150} A comparison of the court’s findings that a browsewrap agreement was enforceable in \textit{Pollstar v. Gigmania, Ltd.}, where the hyperlink in small grey print on a grey background was enough to put the business on notice, illustrates the pattern of heightened contract policing when the issue involves consumers.\textsuperscript{151} Based on the reasoning provided in \textit{Pollstar}, it is arguable that the consumers in \textit{Specht} were put on notice because consumers had already benefited from the website and were aware that there was a contract governing previously since consumers were forced to accept the terms before downloading the Netscape software.\textsuperscript{152} However, the court still reasons otherwise and prevents arbitration.\textsuperscript{153}

Further, when applying specific UCTD provisions to this case, the court is certainly abiding by the underlying policy reasons for closely policing consumer contracts. This is especially true since the issue at hand involves the enforcement of an arbitration clause. Item(q) of the UCTD’s Annex requires European courts to evaluate any term that hinders the consumer’s right to take legal action, “particularly by requiring the consumer to take disputes exclusively to arbitration.”\textsuperscript{154} By contrast, the United States’ courts and legislation encourage arbitration generally.\textsuperscript{155} Despite the general acceptance of arbitration clauses in contracts by American courts and legislation, the court here is able to evaluate the fairness of the arbitration clause and ultimately invalidate its enforceability by focusing on the context and location of the browsewrap hyperlink, rather than the actual terms of the arbitration clause.

\begin{footnotesize}
150 \textit{Id.}
152 \textit{Specht v. Netscape Commc’ns Corp.}, 306 F.3d 17, 22 (2d Cir. 2002).
153 \textit{Id.} at 32.
154 Maxeiner, \textit{supra} note 4 at 135-36.
155 \textit{See} 9 U.S.C.A. § 2 (West). \textit{See e.g.}, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), Cruz v. Cingular Wireless, LLC, 648 F.3d 1205 (11th Cir. 2011). Both these cases finds class-action waiver clauses enforceable and their accompanying requirement to arbitrate enforceable.
\end{footnotesize}
2. *In re Zappos.com, Inc., Customer Data Security Breach Litigation*

Ten years following the *Specht* decision, this case was brought by plaintiffs after a security breach of Zappos’ website in which a hacker downloaded files containing customer information.\(^{156}\) Following the hack, the plaintiffs filed complaints in federal district courts across the country seeking relief from the online retailer.\(^{157}\) In response, Zappos filed a motion to compel arbitration pursuant to Zappos’ Terms of Use located in a browsewire agreement on the company’s website.\(^{158}\)

When the plaintiffs accessed zappos.com, the Terms of Use hyperlink could be found between the middle and bottom on every webpage and became visible when a user scrolled down.\(^{159}\) Based on the court’s additional findings that “the link was the same size, font, and color as most other non-significant links,” and the fact that the website never directs a user to the Terms of Use, the court found that, “without direct evidence that Plaintiffs click on the Terms of Use,” they could not conclude that “Plaintiffs ever viewed, let alone manifested assent to, the Terms of Use.”\(^{160}\) The court additionally noted, “Despite [a] strong policy in favor of arbitration, arbitration is a ‘matter of contract,’ and no party may be required to submit to arbitration ‘any dispute which he has not agreed so to submit.’”\(^{161}\)

There are two key aspects of this court’s opinion worth noting. First, the court states in its conclusion that “direct evidence” is necessary to show manifested assent.\(^{162}\) This standard of “direct evidence” is much higher than the standards set forth in previous cases involving business-to-business contracts such as *Cairo v. Corssmedia Services, Inc.*, in which the court found that even before receiving the cease-and-desist letter, Cairo had already assented to the

\(^{157}\) *Id.*
\(^{158}\) *Id.*
\(^{159}\) *Id.* at 1064.
\(^{160}\) *Id.* (emphasis added)
\(^{161}\) *Id.* at 1062 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 79 (2002)).
\(^{162}\) *Id.* at 1064.
terms of the browsewrap agreement because of the “imputed knowledge” garnered from continually using and benefiting from the site. 163 This “direct evidence” standard is even higher than the standard set in Specht since the Second Circuit in that opinion found the browsewrap agreement to be unenforceable because the hyperlink did not “place consumers on inquiry or constructive notice of those terms.” 164 “Constructive notice” suggests that indirect evidence could be enough to put a consumer on notice. In contrast, the court’s conclusion in Zappos explicitly states that evidence of assent must be direct.

In considering the decisions of other courts, including Specht, this court’s decision to rely on direct evidence rather than constructive notice illustrates a heightened concern for consumer protection since the Specht decision ten years earlier. 165 In addition, the court’s decision here to raise the bar to “direct evidence” is similar to the standard set by Item(i) of the UCTD Annex because it provides that a term may be found unfair if it has the effect of irrevocably binding the consumer to terms with which the consumer had no real opportunity of becoming acquainted before the conclusion of the contract. 166 Similarly, while this court does not look specifically at the terms, the court’s requirement of direct evidence of assent illustrates the court’s desire to give consumers the opportunity to “become acquainted” with the contract before the consumer is bound to its terms.

The second key aspect of the court’s decision in Zappos relates to Item(q) of the Annex of the UCTD, in which the Directive requires European courts to evaluate terms that hinder a

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164 Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 22, 32 (2d Cir. 2002).
166 Council Directive 93/13, supra note 49 at 33. See also Maxeiner, supra note 1 at 135-36.
consumer’s right to exercise legal remedies, specifically mentioning arbitration provisions.\textsuperscript{167} As previously mentioned, the court in \textit{Zappos} noted that a motion to compel arbitration requires that the party must first assent to the contract in which the arbitration clause exists \textit{despite} the general favorability towards arbitration.\textsuperscript{168} Much like how the UCTD favors consumers when terms are ambiguous, the court here is favoring consumers since there is not direct evidence that consumers assented or even had notice that the contract existed.\textsuperscript{169} This is especially significant because while the UCTD requires the courts to evaluate terms that hinder a consumer’s right to take legal action, the United States Legislature takes almost the opposite approach by not requiring courts to evaluate the validity of arbitration clauses \textit{unless} “such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{170} By requiring direct evidence of assent, this court decision falls within the standards set in Item(q) even though the court does so by evaluating the formation of the contract as a whole, rather than evaluating the arbitration clause on its own.


The dispute in this case arose when Nguyen and other customers received an email, following their purchase of touchpads from the Barnes & Noble website, informing them that their orders had to be cancelled due to an unexpectedly high demand for the product.\textsuperscript{171} Subsequently, Nguyen filed this lawsuit on behalf of himself and a putative class of consumers whose orders had also been cancelled.\textsuperscript{172} The plaintiffs alleged that in cancelling their orders and forcing them to rely on substitute technology at a much higher price, Barnes & Noble engaged in deceptive business practices and false advertising.\textsuperscript{173} In response, Barnes & Noble moved to compel arbitration and

\textsuperscript{169} Rustad & Onufrio, \textit{supra} note 7 at 1134-35.
\textsuperscript{170} 9 U.S.C.A. § 2 (West).
\textsuperscript{171} \textit{Nguyen v. Barnes & Noble, Inc.}, No. 12–56628, 2014 WL 4056549, at *1 (9th Cir. 2014).
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
argued that Nguyen was bound by the arbitration agreement in the website’s Terms of Use because the placement of the Terms of Use hyperlink put Nguyen on constructive notice of the arbitration agreement. Analogous to the issue in Zappos, Nguyen contended that he could not be bound by these terms since he never had notice nor assented to the Terms of Use—constructive or otherwise.

Because there was no evidence that Nguyen had actual knowledge of the agreement, the issue of the enforceability of the browsewrap agreement turned on whether Barnes & Noble’s website put a “reasonably prudent user on inquiry notice of the terms of the contract.” The Terms of Use hyperlink in this case was placed in the bottom left-hand corner of every page on the website and was in close proximity to the buttons a user must click on to complete an online purchase. Unlike the previous cases discussed, these terms were also visible without scrolling.

Despite the court noting that the circumstances of this case are distinguishable from Specht because the hyperlink terms here were much more conspicuous, the court still ultimately held that the browsewrap agreement, and the arbitration clause within it, were unenforceable. In concluding this decision the court stated:

In light of the lack of controlling authority on point, and in keeping with courts’ traditional reluctance to enforce browsewrap agreements against individual consumers, we therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.

In rejecting Barnes & Noble’s argument that the placement of its Terms of Use hyperlink were conspicuous enough for at least constructive notice of the terms, the Court additionally stated,

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174 Id. at 1, 2.
175 Id. at 2.
176 Id. at 4 (citing to Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 22, 30-31 (2d Cir. 2002)).
177 Id. at 5.
178 Id.
179 Id. at 5-6.
180 Id. at 6 (emphasis added).
“the proximity or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice.”181

The court’s conclusion in this case is similar to the Zappos holding because it states that constructive notices of the terms are not enough to show manifestation of assent.182 Importantly, the court in Nguyen explicitly justifies its conclusion on the basis that there is a “traditional reluctance to enforce browsewrap agreements against individual consumers.”183 This “traditional reluctance” was built by the holdings in previous cases such as Specht, Zappos, and various others cited to within each case’s opinions.184 This illustrates how courts in the United States are building precedent to better police consumer contracts and protect consumers. By doing so, these courts are achieving the same goals set forth by the UCTD.185 The preamble of the UCTD recognizes that European courts have a right to police unfair contract terms because they have a “legitimate interest under national law in protecting consumers.”186 Likewise, courts in the United States such as the court in Nguyen are recognizing that court precedent illustrates reluctance in enforcing browsewrap agreements against consumers. Therefore, the courts in the United States are also recognizing an interest in protecting consumers in contracts—especially regarding arbitration clauses—that are traditionally accepted and would otherwise be enforceable.187

Following the court’s holding, the court in Nguyen takes the time to address the defendant’s argument that Nguyen had constructive notice of the browsewrap agreement due to

\[\text{Id. at 5.}\]
\[\text{Id. at 6. See also In re Zappos.com, Inc., Customer Data Sec. Breach Litig., 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012).}\]
\[\text{Council Directive 93/13, supra note 49 at 33. See also Rustad & Onufrio, supra note 7 at 1134.}\]
\[\text{Council Directive 93/13, supra note 49 at 33. See also Rustad & Onufrio, supra note 7 at 1134.}\]
\[\text{See 9 U.S.C.A. § 2 (West). See e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), Cruz v. Cingular Wireless, LLC, 648 F.3d 1205 (11th Cir. 2011).}\]
his familiarity with other websites governed by browsewrap agreements including his own personal website and other commonly used websites such as LinkedIn, Myspace, Facebook, and Twitter. The court found that this argument ultimately failed because Nguyen’s personal experience with browsewrap agreements found on other websites “has no bearing on whether he had constructive notice of Barnes & Noble’s Terms of Use.”

The court’s rejection of this argument is significant because it directly contradicts the reasoning of courts in cases that involve business-to-business contracts. In the cases previously discussed such as Cairo and Southwest, both courts determined that despite the presence of a cease-and-desist letter, the businesses should have known about the terms due to the nature of their business and because their businesses were benefitting from using the site. Here, by holding that Nguyen’s prior experience is irrelevant to the issue of whether he had constructive notice of the agreement, the court is further illustrating how American courts distinguish between browsewrap agreements involving two businesses and browsewrap agreements involving consumers. Therefore, this is further evidence of heightened contract policing when consumers are involved and of continued support of Lemley’s contention that if browsewrap agreements should be enforced, it should be done so only in the case of business-to-business contracts.

The facts of the cases discussed above certainly illustrate that the presence of a consumer plaintiff serves as a proxy to indicate there is a heightened need for protection and scrutiny regarding the agreement’s enforceability. However, it is important to note that the presence of a consumer plaintiff is not dispositive. This factor must be accompanied with a proper type of challenge. In Specht, Zappos, Nguyen, and similarly situated cases, the challenge

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189 Id.
191 Lemley, supra note 3 at 464.
is against the enforceability of the browsewrap agreement as a whole.\textsuperscript{192} Consumer plaintiffs in identical circumstances to the cases previously discussed that have lost their browsewrap agreement argued that a specific clause in the agreement was unconscionable.\textsuperscript{193} This type of challenge prevents courts from protecting consumers for two reasons. First, as previously mentioned, unconscionability is a very high standard to achieve and the terms challenged, typically a forum selection clause or arbitration clause, are standard terms that are deemed to be substantively fair in many types of contracts.\textsuperscript{194} Second, by only challenging the specific clause, the consumer is essentially waiving the ability to challenge the location of the browsewrap agreement. When there is no issue as to whether the consumer was put on notice of the agreement as a whole, the court can easily shift the blame to consumers who arguably had the responsibility to be aware of those terms once they were aware of the agreement. The difference between these cases and cases such as \textit{Specht, Zappos}, and \textit{Nguyen} further illustrate the limited protection American courts provide consumers and additionally, the heightened importance for the precedent set by \textit{Specht, Zappos}, and \textit{Nguyen} and others.

\textbf{V. Protection of Consumers In the Future: Browsewrap Agreements and Beyond}

While the cases discussed illustrate how courts in the United States are protecting consumers by closely policing browsewrap agreements, this policing still cannot compare to the expansive scope and implications of the UCTD. For example, the UCTD is obviously not confined only to browsewrap agreements and polices all types of contractual terms.\textsuperscript{195} Even more importantly however, the scope of the UCTD is not restricted to the individual case before a European court. The decision of a European court also applies to the “continued use of such terms” and actions and a holding may be directed against sellers collectively instead of a single seller being sued in a single


\textsuperscript{193} \textit{Id}.

\textsuperscript{194} Maxeiner, \textit{supra} note 4 at 118.

\textsuperscript{195} Council Directive 93/13, \textit{supra} note 49 at Art. 1(1). \textit{See also} Maxeiner, \textit{supra} note 1 at 134.
Therefore, not only is the UCTD concerned with invalidating objectionable terms, the UCTD seeks affirmatively to “stamp them out.” This obviously brings the policing of contracts to a higher level than is presently in force in the United States and provides the basis for why many scholars are calling for a redress of consumer contract law to ensure that contracts may be equally enforceable in either territory.

To fulfill its intent to “stamp out” objectionable terms, Article 7(1) of the UCTD requires Member States to ensure that “adequate and effective means exist to prevent the continued use of unfair terms.” Specifically, Paragraph 2 of Article 7 authorizes consumer groups to bring actions in order to “prevent the continued use of such terms.” Citing to the European Union Commission Report, James R. Maxeiner notes in his article *Standard-Terms Contracting the Global Electronic Age: European Alternatives*, that, “these measures are designed to overcome infirmities of private litigation where ordinarily the judgment only affects the party before the court, and not the world at large.” Therefore, every decision is meant to having lasting implications beyond the scope of an individual case.

While it is true that the United States does not have legislation that enables courts to “stomp out” the use of objectionable terms and contracts beyond the scope of the individual case before them, cases such as *Nguyen* serve as evidence that the courts are using precedent to “stomp out” unfair terms in the case of browsewrap agreements. As the court in *Nguyen* states in its holding, courts are reluctant to enforce browsewrap agreements involving consumers and that is enough for the court to hold in favor of the consumer even though the

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198 *Id.* at 171-72. *See also* Rustad & Onufrio, *supra* note 7 at 1189-90.


201 Maxeiner, *supra* note 4 at 136-37.

hyperlink was conspicuously placed.\textsuperscript{203} By providing this precedent for courts to rely on, courts in the United States are capable of “stomping out” unfair terms in the future—at least regarding browsewrap agreements—much like the UTCD requires European courts to do in applying its decisions beyond the scope of the individual case.

The reality is that browsewrap agreements are only one very narrow type of contract that could potentially have consequences on consumer agreements that occur between businesses and customers in the United States and Europe. National laws that implement the UCTD are a reality throughout Europe and it is therefore necessary that American businesses, especially those on the Internet, take note of them.\textsuperscript{204} The European Union specifically formed formal legal institutions to transcend national borders and develop equal enforcement of consumer protection throughout the E.U.\textsuperscript{205} Thus, with these mandatory consumer protection rules, European courts and consumer agencies are not capable of trying to accommodate many contracts that are likely to be found enforceable in the United States unless—as evidenced by the example of browsewrap agreements—there is a lack of notice and assent to the contract in its entirety.\textsuperscript{206} Businesses that are capable of doing international transactions abroad via the Internet should therefore, consider legal restrictions such as the UCTD when drafting standard contract terms. Consideration of contracting restrictions can be increasingly beneficial to expanding a business’s global marketization. For example, the European Commission contends that Internet commerce will increase only if consumers are convinced they have a minimal adequate remedy when entering into cross-border sales and services.\textsuperscript{207}

Further, even though American contract law generally may never reach the same level of consumer protection in Europe, the need for consumer protection in the case of browsewrap

\textsuperscript{203} Id.
\textsuperscript{204} Maxeiner, supra note 4 at 171.
\textsuperscript{205} Rustad & Onufrio, supra note 7 at 1120-21.
\textsuperscript{206} Id. at 1117.
\textsuperscript{207} Rustad & Onufrio, supra note 7 at 1188.
agreements goes beyond the concern for facilitating global transactions. Due to the lack of assent, there is a heightened need for consumer protection and contract policing regarding browsewrap agreements. The courts’ denial of browsewrap agreement enforcement in the cases previously discussed illustrates how courts recognize this need. It is true that American contract law’s lower standards for consumer protection has appeared to open the door to more rapid growth and innovation in online retail marketing in contrast to the European Union. However, American consumers are paying for that rapid marketization. While heightened consumer protection constrains the possibility of innovation, European Union law forces merchants to suffer the costs of internalizing high compliance costs in order to ensure that consumers are protected from the type of unwanted contracts that American consumers are threatened with in the form of browsewrap agreements. Although browsewrap agreements are innovative in that they are efficient, the costs that browsewrap agreements impose on American consumers justifies the courts’ decisions so far in only enforcing them in cases where the parties are experienced businesses.

The holdings in cases such as Specht, Zappos and Nguyen reflect the realistic expectations of consumers when they visit any website. For example, as pointedly illustrated by Woodrow Hartzog in his article, The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?:

When viewers turn on the television, they are not legally bound to arbitrate, rather than litigate in court, any disputes they might have with the network. The simple act of turning on the radio does not prohibit listeners from singing to a friend the songs they heard. By purchasing a newspaper, a reader is not agreeing to let the publisher sell personal information. Yet as media converge digitally, readers, viewers and listeners are required to enter into contracts.

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209 Id.
210 Id.
While it is true that consumers in cases such as Specht, Zappos and Nguyen are not necessarily passive because they are downloading software or purchasing items from the company's sites, this excerpt illustrates the common expectations of a reasonable Internet user.\footnote{See, Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 31 (2d Cir. 2002), Nguyen v. Barnes & Noble, Inc., No. 12–56628, 2014 WL 4056549 (9th Cir. 2014), In re Zappos.com, Inc., Customer Data Sec. Breach Litig., 893 F. Supp. 2d 1058 (D. Nev. 2012).} The Internet serves as an outlet to conduct various types of activities whether it be for business or for leisure. As lawsuits continue to arise regarding browsewrap agreement enforceability, it is important to recognize consumer expectations equally regardless of why the consumer is using a site. Since the courts in Specht, Zappos and Nguyen address the enforcement of browsewrap agreements regarding consumers that have benefitted, or were trying to benefit, from the website rather than simply use it, it is important—and hopeful—that courts further the application of these holdings in various circumstances where consumers may face a surprise browsewrap agreement.\footnote{Id.} This reasoning further echoes Item(i) in the UCTD Annex because courts are preventing consumers from being bound to terms they did not have the opportunity to read or consider.\footnote{Council Directive 93/13, supra note 49 at 33. See also Maxeiner, supra note 1 at 135-36.} The expectations of consumers are especially important to consider in the case of browsewrap agreements because contract doctrine is meant to protect the expectations of the parties. Regarding contracts generally, scholars have already recognized the enforcement of standard form contracts generally tend to conflict with consumers’ expectations.\footnote{See e.g., Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 Stan. L. Rev. 211 (1995), Hartzog, supra note 211 at 408.} In the case of browsewrap agreements, consumers may not have any expectations to begin with because they are unaware that an agreement exists.\footnote{Hartzog, supra note 211 at 408.}

Even if a consumer reads the terms contained in a legal terms link or at least knows it is present on the page, empirical and scientific research demonstrates that an individual’s cognitive limitations and the design and presentation of standard form contracts significantly...
frustrate an individual’s ability to understand a contract’s terms.\textsuperscript{217} In his article, \textit{The Limits of Cognition and Limits of Contract}, Melvin A. Eisenberg discusses the common problems that consumers face when confronted with a standard forms contract.\textsuperscript{218} First, as a systematic matter, Eisenberg notes that people are unrealistically optimistic.\textsuperscript{219} This is especially true in the usual context of a browsewrap agreement between consumers. For example, the plaintiffs in \textit{Nguyen} probably did not anticipate they would be forced to arbitrate or even have to litigate, when they purchased tablets from the Barnes & Noble site.

A second important point in Eisenberg’s article is that standard form contracts often contain a very large number of legal terms.\textsuperscript{220} Like any other standard form contract, browsewrap agreements are also riddled with cumbersome legal terms. The Terms of Use in \textit{Zappos} stated for example, “You hereby consent to, and waive all defense of lack of personal jurisdiction and forum non conveniens with respect to venue and jurisdiction in the state and federal courts of Nevada.”\textsuperscript{221} The average consumer may not understand or, even try to understand, the consequences of agreeing to the terms set forth in this sentence. Further, this sentence is located in the middle of a long paragraph sandwiched between other wordy sentences.\textsuperscript{222} Given that the consumer will find it difficult or nearly impossible to fully understand the terms, which involve risks that are unlikely to mature, unlikely to be worth the cost of search and processing, and which probably aren’t subject to revision in any event, “a rational form taker will typically decide to remain ignorant of the preprinted terms.”\textsuperscript{223} This is especially true in the case of browsewrap agreements since many consumers do not choose ignorance but rather, are ignorant because they are not aware of the terms to begin with.

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} Eisenberg, \textit{supra} note 215 at 211.

\textsuperscript{219} \textit{Id.} at 216.

\textsuperscript{220} \textit{Id.} at 241.


\textsuperscript{222} \textit{Id.}

\textsuperscript{223} Eisenberg, \textit{supra} note 215 at 243.
These cognitive limitations are heightened in the context of browsewrap agreements since there is even less of likelihood that a “rational form taker” will take the time to read, consider, and understand the legal terms since not only is litigation usually unlikely, but typically the consumer must go to a completely different web page before actually getting to the terms themselves. Although this seems like a small hurdle, it adds to the likelihood that even the most rational website user—who first must find the link to the legal terms before actually reading the terms—will not take the time to read the actual terms in the browsewrap agreement. This factor further justifies the heightened consumer protections the courts provide in cases concerning browsewrap agreements.

The precedent set by the courts discussed above will certainly affect how online businesses and social networks consider structuring their legal terms considering browsewrap agreements have a massive presence on the Internet. Social networking Terms of Use agreements are the most widely used standard form contract with potentially billions of users. For example, as of September 2014, there were on average 864 million daily active users and approximately 82.2% of these users were outside the United States and Canada. However, social networking sites such as Facebook may have possibly found one way to get around the issue of browsewrap agreement enforceability by using a browsewrap agreement hybrid. For example, in Fteja v. Facebook, the Court enforced a forum-selection clause in a browsewrap agreement because “the Terms of Use were not exactly a true browsewrap license.” In this case, the hyperlink was located next to the “sign up” button and was

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224 Rustad & Onufrio, supra note 7 at 1086.
accompanied with the sentence “By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service.” This type of agreement avoids the problems presented in cases such as Nguyen and Zappos because the browsewrap agreement is not the sole source of notice that an agreement is in place. While this click-through/browsewrap hybrid agreement does certainly provide an Internet user with better notice that legal terms are in place, it still leaves unanswered the question of how this type of contract would be enforced abroad. In the case of Facebook for example, with 82.2% of Facebook users outside the United States, potential legal problems are inevitable.

The approach used by American courts in handling the enforceability of browsewrap agreements provides hope that courts may develop precedent to better protect consumers in various other types of contracts. While the E.U. is developing transnational regulatory agencies in order to effectively regulate consumer protection in every country, American courts vary in their consumer protection by jurisdiction. This raises an additional hurdle for reaching the standard of contract policing set by the UCTD. However, American courts have effectively reached that hurdle—so far—in the case of browsewrap agreements by relying on non-binding authorities in other jurisdictions in following a pattern that favors consumer protection. The case of the browsewrap agreement illustrates that courts are able to avoid potentially problematic barriers, such as the unconscionability doctrine, by providing alternative avenues for consumers to pursue in showing that they should not be bound by the terms of a contract absent assent. This is not only a positive achievement to avoid unwanted and surprising contracts for consumers in the United States, but also illustrates that there are ways Internet businesses can ensure that their contracts are enforceable abroad. Given the reality of the

228 Id. at 835.
229 Rustad & Onufrio, supra note 7 at 1143-44 (noting that several EU countries such as Germany are considering legal action against Facebook).
230 Id.
231 Rustad & Onufrio, supra note 7 at 1122.
current enforceability of consumer contracts in the United States, in addition to the unfair and undesired consequences of the enforcement browsewrap agreements against consumers, it is desirable for browsewrap agreements, and possibly in the future other types of agreements, to be policed in this way.\textsuperscript{232}

VI. Conclusion

For consumer protectionism in the United States to reach the same standard of policing set forth by the European Unfair Contract Terms Directive, there would need to be several fundamental changes in how American courts approach contract law. For example, standard form contracts, along with forum-selection clauses and arbitration clauses, would either have to be highly policed when these contracts involved consumers or not enforceable at all. Even this specific example of what would have to change illustrates how completely paralleling the UCTD would have to come at the cost of the freedom to contract principle that is so embedded in American legal theory. The decision to take the potentially drastic steps needed to police the same way as the UCTD does, is up to both the legislature and courts and would take a number of years. But it is important to note, despite these potential hurdles, the benefits of implementing a heightened standard of contract policing would be equivalent to simply asking the question of what is fair and what did the bargaining parties expect when the contract was made.

However, the steps needed to heighten consumer protection in the case of browsewrap agreement enforcement have already been taken. Based on the browsewrap agreement cases previously discussed, the pattern of the enforceability of browsewrap agreements in American courts at least meets the minimum requirement of the European Union’s Unfair Terms Directive.\textsuperscript{233} The Directive is meant to be a minimum requirement to be met by the member-

\textsuperscript{232} Id.
states of the European Union. Thus, it is up to the individual country’s to decide how they will enforce the terms of the agreement. Although American courts are not using unconscionability to find browsewrap agreements unenforceable, the courts are taking advantage of other avenues to invalidate browsewrap agreements by analyzing contract formation. This is becoming increasingly evident in recent cases such as *Nguyen v. Barnes & Noble* where despite noting the conspicuousness of the hyperlink, the pattern towards favoring consumer protection in similar cases encouraged the court to find the browsewrap agreement unenforceable.

The pattern of enforcing business-to-consumer browsewrap agreements leads to two important points. First, while the E.U. is providing courts and consumers with the power to “stomp out” unfair terms in contracts generally, courts in the United States are coming to the same conclusion within the narrow scope of browsewrap agreements and using previous court decisions to protect consumers from unwanted browsewrap agreements. Second, although scholars correctly point to the fact that the E.U. Unfair Terms Directive would not enforce many of the contracts that are generally enforced in the United States, there is at least a clear exception regarding browsewrap agreements.

While a browsewrap agreement is a very specific type of contract, the courts’ unwillingness to enforce browsewrap agreements at least shows that American Courts might be able to find ways to harmonize with contract enforcement abroad, even if it is not through the means used by European courts. This willingness also illustrates that browsewrap agreement enforcement requires a heightened need for contract policing that at least meets the minimum requirements set by the UCTD. Even if American contract law is incapable of meeting the

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237 See Maxeiner, *supra* note 4 at 135-36 (discussing the UCTD’s intent to “stomp out” unfair terms in contracts generally).
UCTD standards more generally, courts are justified in denying the enforcement of browsewrap agreements against consumers because in these cases, consumers are often faced with a contract they did not even know existed. This precedent illustrates overall that as long as a browsewrap agreement is the only source of notice, consumers should be able to surf the Internet and purchases products online without fear of being bound by an unknown agreement.