

3-1-2012

## Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse

Cheryl B. Preston

Eli W. McCann

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>



Part of the [Contracts Commons](#), and the [Internet Law Commons](#)

---

### Recommended Citation

Cheryl B. Preston and Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. Pub. L. 1 (2012).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol26/iss1/2>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse

Cheryl B. Preston\*

Eli W. McCann\*\*

*[When no contracting] choice [is] really available, it has been and still is the law's business, and in a case-law system, the judges', to see that the block to which you are indeed assenting as a transaction is carved into some approximation of decent balance in its detail.*

—Karl Llewellyn, 1939<sup>1</sup>

*Both private and social contracts are hard to change, but only someone distracted by babble about “contracts of adhesion” would think this an objection rather than a benefit.*

—Frank Easterbrook, 1998<sup>2</sup>

## I. INTRODUCTION

The simple purpose of this Article is to critique recent judicial liberality toward online contracts, however denominated as “Terms of Service,” “End User License Agreement,” “Terms and Conditions,” or “Faustian Bargain,”<sup>3</sup> all of which we abbreviate as “TOS.” With wanton irreverence and mixed metaphors, we identify Judge Easterbrook and

---

\* Edwin M. Thomas Professor of Law, J. Reuben Clark Law School, Brigham Young University. We thank the following for able and effective comments, research and editing assistance: Brandon Crowther, Nathan Anderson, Corey Hansen Boyd, Timothy West, Andrew Sellers, and the editors of the JPL. We dedicate this paper to horses everywhere.

\*\* Eli McCann, J.D., J. Reuben Clark Law School, Brigham Young University; B.A. Brigham Young University. Clerk 2011–2012, Utah Court of Appeals, Hon. Gregory Orme.

1. K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 n.7 (1939) (emphasis omitted).

2. Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998).

3. “Faust, in the legend, traded his soul to the devil in exchange for knowledge. To ‘strike a Faustian bargain’ is to be willing to sacrifice anything to satisfy a limitless desire for knowledge or power.” Faustian Bargain, *The American Heritage® New Dictionary of Cultural Literacy* (3d ed. 2005), available at <http://dictionary.reference.com/browse/faustianbargain>. To obtain the information or computer code available beyond a link on a webpage, many of us will without a second thought accept a legally enforceable contract that may well include draconian terms.

*ProCD v. Zeidenberg* as a key that opened the gates to broader enforcement of adhesive form contracts generally and allowed the new ungated form contract to morph into the truly unruly TOS, a beast untied from the contexts in which form contracts gained (limited) legitimacy. We review what makes TOS unruly—both in terms of assent and content—and then argue that, current econ-crazed, digital-worshipping judges (bless their hearts) have adopted a wild horse while forgetting that such beasts were only originally allowed into civilized communities because they were in a corral.

In Part II of this Article we review the history of adhesion contracts. We then critique *ProCD* and describe how the case's importance has been unfairly magnified. In Part III we define online wrap contracts and illustrate what constitutes “assent” to enter such a contract. We then illustrate the kinds of problematic clauses that commonly lurk in TOS. In Part IV we describe the tolerant treatment courts have given TOS in recent years. We conclude that adhering to a legal concept ripped from the reins in which it was developed is as irrational as fixing a one-horse race.

## II. WHAT HORSES AND OFT-CITED CASES HAVE IN COMMON

One of the most famous hypotheticals in the emergence of contract law involves two men and a horse. The men, cleverly named “A” and “B,” agreed to the purchase and sale of said horse for £10. In 1703, Chief Justice Holt in *Callonel v. Briggs* opined: “If I sell you my horse for [£]10 if you will have the horse, I must have the money; or, if I will have the money, you must have the horse.”<sup>4</sup> Holt then cites his 1701 opinion in *Thorp v. Thorp* (intermittently over the years misspelled as *Thorpe v. Thorpe*), where he relied on a less cleverly worded version of the same hypothetical to hold that, until the horse is delivered, the buyer has no action for the money.<sup>5</sup> Neither case actually involved horses and both were breaks from the common law.

Originally, in English common law, B (buyer) was not excused from paying A (seller) simply because A refused to show up and deliver the horse.<sup>6</sup> This produced an awkward result for B, a state of law lamented

---

4. (1703) 91 Eng. Rep. 104 (K.B.) 104; 1 Salk. 112, 113.

5. (1701) 88 Eng. Rep. 1448 (K.B.); 12 Mod. 455.

6. See, e.g., HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 10:2 (2011); Amy B. Cohen, *Reviving Jacob and Youngs, Inc. v. Kent: Material Breach Doctrine Reconsidered*, 42 VILL. L. REV. 65, 73 (1997); MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 107 (2d ed. 1993). For an astonishingly detailed discussion of the evolution of the law on dependent covenants, see S.J. Stoljar, *Dependent and Independent Promises: A Study in the History of Contract*, 2 SYDNEY L. REV. 217 (1957). Stoljar, I.L.B., LL.M., Ph.D, was a professor at the Australian National University.

by Justice Willes in 1744 who notes his objection to such cases but resigns that “they are too many to be now over-ruled.”<sup>7</sup> He fails to note *Collenel, Thorp, or Oddin v. Duffield*, a case decided in Justice Willes’ court of Common Pleas in 1716 that came to the opposite conclusion.<sup>8</sup> Not all English jurists were so cowed by these “now too many” cases. Later, a wildly activist judge, Lord Mansfield,<sup>9</sup> in *Kingston v. Preston* in 1773 described that mutual promises could be treated as dependent conditions precedent, even if the parties failed to use any words that hinted of such intent.<sup>10</sup> He did so without mentioning any prior cases, agreeing or disagreeing. After comparing the two printed versions of *Kingston* and a “lengthy manuscript report” of the case among the Hill Manuscripts at Lincoln’s Inn Library, Professor Oldham suggests the facts (but not the state of the law) may have been conducive to Mansfield’s holding, but the argument on dependent covenants “made perfect sense to Mansfield, himself a shrewd man of business.”<sup>11</sup> Thus, this may have been an early case of economic theory trumping law.

Despite its popularity, *Kingston v. Preston* is almost never cited to the original 1773 version.<sup>12</sup> Typically it is cited to a quoted excerpt in *Jones v. Barkley*.<sup>13</sup> That opinion illustrates our point that *Kingston* was only one of the cases so holding, and clearly not the first. The court in *Jones v. Barkley* first cites *Turner v. Goodwin*<sup>14</sup> for the conditions precedent conclusion, but then notes in a footnote that the record of the case may not be very reliable, and the other options are less reliable.<sup>15</sup>

This only matters because His Lordship is seventy years late to the

7. *Thomas v. Cadwallader*, (1774) 125 Eng. Rep. 1286 (C.P.) 1288 (K.B.); Willes 496, 499.

8. This case is unreported although it is part of the casenotes of which Justice Willes surely had access, James Oldham, *Detecting Non-Fiction: Sleuthing Among Manuscript Case Reports for What Was Really Said*, in *LAW REPORTING IN BRITAIN* 133, 145 (Chantal Stebbings, ed. 1995).

9. He could probably get away with things because he was “His Lordship.”

10. (1773) 98 Eng. Rep. 606 (K.B.) 608; Lofft 194, 198 (Lord Mansfield) (original transcript under the heading “Covenants.”). A summary of the facts and a more thorough explanation of Mansfield’s reasoning is quoted within *Jones v. Barkley*, (1791) 99 Eng. Rep. 434 (K.B.) 437; 2 Doug. 684, 689. Interestingly, the original 1773 Lofft transcript does not contain some of the points for which the case is famous, such as the reference to three kinds of dependent covenants and that dependency can be surmised from the “evident sense and meaning of the parties.” *Id.* at 438.

11. Oldham, *supra* note 8, at 143 n.43.

12. *Id.* at 141 n. 43.

13. 99 Eng. Rep. at 437; 2 Doug. at 689.

14. (1714) 88 Eng. Rep. 671 (K.B.); 10 Mod. 153.

15. 99 Eng. Rep. at 436, n.2; 2 Doug. at 689 (“This case of *Turner v. Goodwin*, as stated in Viner’s Abridgment, vol. 20, p. 183, pl. 9, is still more in point to the present, for, there, the words are, ‘upon his assigning a judgment.’ But Viner cites the case from a book of still less authority than 10 Mod. viz. 2 Barnard. 308.”). It is a wonder that any cogent principles of law evolved from the jumble of English case reports. For an interesting account of the incomplete reports of cases, Mansfield’s notes, and *Kingston*, among other Mansfield cases, see generally Oldham, *supra* note 8, at 140–41.

idea but gets undeserved credit.<sup>16</sup> The current Fourth Edition of *Williston on Contracts* quotes a 1960 Maryland case, *K & G Construction Co. v. Harris*, for the proposition that:

In the case of *Kingston v. Preston*, 2 Doug. 689, decided in 1774 [actually 1773, but who is counting?], Lord Mansfield, *contrary to three centuries of opposing precedents*, changed the rule, and decided that performance of one covenant might be dependent on prior performance of another, although the contract contained no express condition to that effect.<sup>17</sup>

Unfortunately, *K & G Construction* relies entirely on the earlier Revised or Second Edition of *Williston* for this same revelation.<sup>18</sup>

The 1962 Third Edition of *Williston* quotes “a carefully reasoned and well documented opinion,” coincidentally, *K & G Construction*, which as we know relies entirely on *Williston*’s earlier edition for the proposition that “[t]he case in which [dependent covenants] was *first* so decided” is *Kingston v. Preston*.<sup>19</sup> Thus, this conclusion is quite circular if not incestuous. And, for overkill, the next three pages in *Williston Third Edition* are virtually a verbatim reproduction of the entire *K & G Construction* opinion,<sup>20</sup> repeating the paragraph regarding “three centuries” but with a footnote only to *Kingston*, omitting entirely the *Williston Revised Edition* internal source citations.<sup>21</sup> Most of us want to cite ourselves for our own aggrandizement—straight from the horse’s mouth, so to speak; *Williston* wants to credit a likely unsuspecting Maryland state judge for an overstatement the judge obtained from *Williston*.<sup>22</sup>

16. Although *Kingston* is one of the “[c]omparatively few pre-nineteenth-century cases in the field of contract law [that] still make[s] an appearance in modern casebooks and textbooks,” *id.* at 140, “the ideas Mansfield expressed were not new.” *Id.* at 144.

17. 15 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 44:1, at 78, § 44:1, at 81 (4th ed. 2000) (quoting *K & G Constr. Co. v. Harris*, 223 Md. 305, 164 A.2d 451 (1960)) (emphasis added) (hereinafter *WILLISTON* 4th).

18. *K & G Constr. Co.*, 223 Md. at 312 (“In the early days, it was settled law that covenants and mutual promises in a contract were *prima facie* independent, and that they were to be so construed in the absence of language in the contract clearly showing that they were intended to be dependent. *Williston, op. cit.*, ¶816; *Page, op. cit.*, ¶¶2944, 2945. In the case of *Kingston v. Preston*, 2 Doug. 689, decided in 1774, Lord Mansfield, contrary to three centuries of opposing precedents, changed the rule, and decided that performance of one covenant might be dependent on prior performance of another, although the contract contained no express condition to that effect. *Page, op. cit.*, ¶2946; *Williston, op. cit.*, ¶817. The modern rule, which seems to be of almost universal application, is that there is a presumption that mutual promises in a contract are dependent and are to be so regarded, whenever possible. *Page, op. cit.*, ¶2946; *Restatement, Contracts*, ¶266. *Cf. Williston, op. cit.*, ¶812.”).

19. 6 WALTER H. E. JAEGER, *WILLISTON ON CONTRACTS* § 817, at 28–29 (3d ed. 1962) (emphasis added) (hereinafter *WILLISTON* 3d).

20. *Id.* at 30–34.

21. *Id.* at 33.

22. We’re being somewhat less dramatic than Stoljar: “[T]he famous case of *Kingston v.*

On the next page, *Williston Third Edition* mentions the famous “Sergeant Williams’ Rules” that were appended in 1798 to *Pordage v. Cole*<sup>23</sup> in a revised edition of the report of this case.<sup>24</sup> Sergeant Williams adds to a report of *Pordage* the famous footnote four, one of the seven wonders of ancient case law. It is more than twice as long as the text of the opinion and includes *five sub-footnotes*. In footnote four, as *Williston* describes it in the Third Edition, Williams gripes about the existing cases, and then offers five rules for deciding the issue of which covenants should be dependent based on the “essence” of the deal and not the technical words.<sup>25</sup> The fifth rule is cited to *Colonell, Thorpe* [sic] and then several other cases, including Mansfield’s much later *Kingston*. One modern commentator averred: “The doctrine of the dependency . . . of promises . . . has been seriously misunderstood and much neglected, and . . . has in many ways remained where Serjeant [sic] Williams left it more than 150 years ago.”<sup>26</sup> *Williston Third Edition* seems to agree, stating that Sergeant Williams’ Rules “remained for years the *recognized statement of the law* and acquired judicial authority by their adoption by the courts,” and then *Williston* quotes a summary of the five rules from—you guessed it—*K & G Construction*.<sup>27</sup> The bottom line is that Lord Mansfield was not first nor was his the most careful and thorough statement of the dependent covenants doctrine.<sup>28</sup>

Early American cases cite *Pordage v. Cole* (intending, no doubt, the version of that case in which footnote four was stuffed a century later),<sup>29</sup> as the source of the doctrine *Williston* credits to Lord Mansfield—unless, of course, they cite the even earlier *Ughtred’s Case* from 1591,<sup>30</sup> or the

---

*Preston*, [is] a case often believed to be the chief climacteric in the history of concurrent conditions. This is, however, a belief, which . . . is a gross oversimplification.” *Supra* note 6, at 238. “Another view is that the dependent-independent doctrine remained virtually unchanged from the sixteenth century until the time of Lord Mansfield. The subsequent developments abundantly prove that this view is *quite seriously mistaken*.” *Id.* at 219 n.16 (emphasis added).

23. (1669) 85 Eng. Rep. 449 (K.B.); 1 Wms. Saund. 319.

24. WILLISTON 3d, *supra* note 19, § 819, at 37 n.7; Stoljar, *supra* note 6, at 228 n.76.

25. WILLISTON 3d, *supra* note 19.

26. Stoljar, *supra* note 6, at 217.

27. WILLISTON 3d, *supra* note 19, at § 820, at 38–39.

28. Although WILLISTON’s claim that Mansfield overruled “three centuries of opposing precedents” is not accurate, WILLISTON is not the only source that credits Lord Mansfield in *Kingston*. See, e.g., Clarence D. Ashley, *Britton v. Turner*, 24 YALE L.J. 544 (1915) (“It is not disputed that this doctrine of implied conditions first arose in *Kingston v. Preston*.”) (no citation in original). Cf. Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth Century England*, 83 COLUM. L. REV. 35, 123 (1993) (“[T]he trend in favor of constructive allocation culminate[d] . . . in *Kingston v. Preston*.”).

29. “Because Serjeant [sic] Williams annexed his famous note to this case, the decision gained enormous prominence, though its precise historical significance remained misunderstood.” Stoljar, *supra* note 6, at 228 n.76.

30. (1591) 77 Eng. Rep. 425 (C.P.); 7 Co. Rep. 9b.

more popular *Thorp v. Thorp* from 1701,<sup>31</sup> in which Judge Holt opined at length on the issue and included—with a plethora of other interesting, but long since forgotten, hypotheticals—A and B’s horse: “where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and, therefore, he says the money shall be given for the horse.”<sup>32</sup>

This famous horse for £10 rises again in Charles Addison’s *A Treatise on the Law of Contracts and Rights and Liabilities ex contractu* in 1847 quoted from *Callonel*.<sup>33</sup> The horse hypothetical then reappears in our 2010 edition contracts casebook,<sup>34</sup> which credits Lord Mansfield’s too-little-too-late opinion in *Kingston*, in which horses are not discussed, with establishing the principle of dependent promises.

One of the most famous contracts metaphors also involves a horse. In *Richardson v. Mellish*,<sup>35</sup> an 1824 Kings Bench case that, incidentally, involved the interpretation of a dense chunk of preprinted boilerplate,<sup>36</sup> Judge Burrough said, “I, for one, protest . . . against arguing too strongly upon [invalidating a contract on the grounds of] public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law.”<sup>37</sup> Professor David Freidman reports that “Judge Burrough’s enduring ‘unruly horse’ metaphor for the public-policy defense to contract . . . appears in the contracts literature, in contracts treatises, and in case law.”<sup>38</sup> For instance, with considerable creativity, Percy Winfield elaborated:

That [horse] has proved to be a rather obtrusive, not to say, blundering, steed in the law reports . . . . And at times the horse has looked like even less accommodating animals. Some judges have thought it more like a tiger, and have refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam’s ass which would carry its rider nowhere. But none . . . ha[ve] looked upon it as a Pegasus that might soar beyond the momentary

31. (1701) 88 Eng. Rep. 1448 (K.B.); 12 Mod. 455.

32. *Id.* at 1453; 12 Mod. at 464.

33. CHARLES ADDISON, *A TREATISE ON THE LAW OF CONTRACTS AND RIGHTS AND LIABILITIES EX CONTRACTU* 865 (1847).

34. BRIAN A. BLUM & AMY C. BUSHAW, *CONTRACTS CASES, DISCUSSION, AND PROBLEMS* 680 81 (2d ed. 2010).

35. (1824) 130 Eng. Rep. 294 (C.P.); 2 Bing. 229.

36. In this case involving a dispute over the legality of a contract between a ship’s captain and the owner of the ship, Justice Burrough relied on the dense standard legalese found in that ship company’s bylaws. *Id.* at 303; 2 Bing. at 252. The “bye-law” contains 205 words, divided only by three sets of “; and.” In addition, it includes this nice tidbit “moreover, the respective parties to such contract receiving, paying, or giving, or contracting to pay, receive, or give, shall severally pay damages to the Company.” *Id.* at 294 n.a.; 2 Bing. at 230 n.a.

37. *Id.* at 303.

38. David A. Friedman, *Bringing Order to Contracts against Public Policy*, F1A, ST. U. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1908026> (internal citations omitted).

needs of the community.<sup>39</sup>

Karl Llewellyn also favored horse trades as the structure for understanding contract law, although his “buyers and these sellers are so definitely not A and B but human beings.”<sup>40</sup> In discussing the application of warranties to wares (also known as non-critter goods) in *Across Sales on Horseback*, he challenges the assumption that “the conjunction of the horse-idea, the King’s Bench, a ware of commerce, two dealers, and the year 1802, . . . provide a start *behind which one does not go back*.”<sup>41</sup> The same year in *The First Struggle to Unhorse Wares*, Llewellyn addresses

“cases which can stand being read in the light of whiskey, the boasting of a little man away from home, and unlucky gambling at the tavern [and which show] . . . the need to give a stranger astride your well-known horse some papers to keep the Society for the Prevention and Detection of Horse Thieves off his neck . . . .”<sup>42</sup>

Thus we see that “horse trades,” defined as a “negotiation accompanied by shrewd bargaining and reciprocal concessions,”<sup>43</sup> are a staple of the formation of contract law. Now, however, the dashing, glib, and famous spokesperson for economics, Judge Easterbrook, has insulted the role of the horse in law—twice. In *CyberSpace and the Law of the Horse*, Judge Easterbrook “welcomed”<sup>44</sup> a crowd of cyberlaw geeks by comparing the ridiculousness of teaching a course on cyberlaw to the absurdity of teaching one on the law of the horse, quipping “[w]hen asked to talk about ‘Property in Cyberspace,’ my immediate reaction was, ‘Isn’t this just the law of the horse?’”<sup>45</sup>

The same year in *ProCD v. Zeidenberg*,<sup>46</sup> Judge Easterbrook suggested that hobbling the free-for-all of rolling contract formation “would return transactions to the horse-and-buggy age,”<sup>47</sup> which—as a

39. Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 91 (1928) (quoted in Friedman, *supra* note 38); see also John Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE L.J. 144 (1972); Dan L. McNeal, *Judicially Determined Public Policy: Is “The Unruly Horse” Loose in Michigan?*, 13 T.M. COOLEY L. REV. 143 (1996).

40. K. N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 728 (1939). Who is to say that the two human beings who are buying and selling a horse for £10 were not actually named “A” and “B”?

41. *Id.* at 737 (emphasis in original).

42. K. N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 881 (1939).

43. MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/horse%20trade> (last visited Oct. 23, 2011).

44. *CyberSpace and the Law of the Horse* was the title of Judge Easterbrook’s welcoming remarks at a “Law and CyberSpace” conference, which were later published. Benjamin Means characterized them as “[s]ome of the least welcoming remarks ever.” Benjamin Means, *Forward: A Lens for Law and Entrepreneurship*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1, 5 (2011).

45. 1996 U. CHI. LEGAL F. 207, 208 (1996).

46. 86 F.3d 1447 (7th Cir. 1996).

47. *Id.* at 1452.



matter of contract law principles—he apparently believes is a bad thing. Actually, the basic transactions in horses gave rise to many wise legal precepts that have been proven by time and trial. What reason have we to throw out horse-and-buggy law with the bathwater because we ever so recently moved into a digital age? Ironically, in *Law of the Horse*, Judge Easterbrook abjures cutting the law free from the broader historical context and foundational principles just because we are talking about cyberspace, and in *ProCD* he rushes to cut away the broader historical context and foundational principles to create a result he thinks is necessary to foster digital markets.<sup>48</sup>

This all goes to show two salient principles discussed in this Article. First, the statements of important people are given more credit than the same or better ideas from unimportant people. This fact is amply evidenced in legal scholarship by citations to certain authors even if they didn't say it first, better, or correctly. More importantly, this fact is evidenced by reliance on cases such as *ProCD v. Zeidenberg*<sup>49</sup> for applications expanded beyond what was required by the case, and the general response to any writings of Judge Easterbrook. Second, as the years pass, the particulars of case precedents get muddled and the nuances lost, thus later courts sometimes pick up a partial idea or rule and forget its context, justifications, and penumbra. One might say they adopt half a horse, and we will argue that the half that modern courts have adopted regarding contracts of adhesion is not the front half.

#### *A. Zeidenberg's Fancy Theft*

Similar to Lord Mansfield and *Kingston v. Preston*,<sup>50</sup> the Seventh Circuit in *ProCD v. Zeidenberg*<sup>51</sup> and *Hill v. Gateway 2000, Inc.*<sup>52</sup> served up extraordinarily influential opinions, even if their fame is undeserved. In both cases the court enforced terms received by the other party after contract formation occurred under traditional principles. Commentary on *ProCD* is so plentiful that any attempt to further discuss it seems like beating a dead horse. But we argue that although *ProCD*'s "rule" is frequently cited, the context of the case is frequently ignored and its importance is overstated.

In *ProCD*, Matthew Zeidenberg purchased software in a retail

---

48. *Id.* at 1447.

49. *Id.*

50. (1773) 98 Eng. Rep. 606 (K.B.) 688; Lofft 194, 198. For issues regarding the proper citation for this case, see *supra* note 10.

51. 86 F.3d 1447 (7th Cir. 1996).

52. 105 F.3d 1147 (7th Cir. 1997) (*cert. denied*, 522 U.S. 808 (1997)).

store.<sup>53</sup> Notwithstanding Judge Easterbrook's offhanded comment suggesting that the contract formed when Zeidenberg accepted the store's offer to purchase,<sup>54</sup> in a typical retail real-world sale, the offer is made by the potential buyer and the store clerk chooses to accept or not.<sup>55</sup> In any event, when Zeidenberg walked out of the store, a contract had formed under traditional contract law. The license with the terms of the contract was not accessible until the shrinkwrap was broken, the box was opened, and the disk's information was accessed on Zeidenberg's computer.<sup>56</sup> At some point, Matthew Zeidenberg decided to play the ponies and copy ProCD's database and sell it to ProCD's market base.<sup>57</sup>

Typical practice in the sale of software when *ProCD* was decided had been to use a "shrinkwrap" contract, where the license terms are visible on the box under the plastic wrap so the potential purchaser can consider them prior to making an offer to buy. The court in *ProCD* found that requiring software vendors to include all of the license terms on the box was unrealistic and inefficient.<sup>58</sup> We believe the seven-by-nine-by-three-inch box in which software is sold would provide plenty of space if the terms were limited to the reasonable number of terms necessary to protect intellectual property written in plain English. Nonetheless, Judge Easterbrook held that, given the space constraints, the terms could be introduced after traditional formation as long as the purchaser had some (maybe only theoretical) opportunity to return the software for some

53. 86 F.3d at 1450.

54. *Id.*

55. It is true that some courts have looked at the store's act of placing an item for purchase on a shelf as the initial offer, but the context of these cases matters. Many cases that analyze contract formation in this way concern 42 U.S.C. § 1983 discrimination allegations or serious tort injuries, where an intent to enter a contract is relevant for finding liability. In this context, we imagine these courts have a special interest in enlarging the concept of how a contract forms in order to pull in more conduct that may be considered discriminatory. See *Gentry v. Hershey Co.*, 687 F. Supp. 2d 711 (M.D. Tenn. 2010) (viewing product placement on a shelf in a § 1983 case as the store's "offer"); *Domino's Pizza v. McDonald*, 546 U.S. 470 (2006) (same); *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979) (discussing contract formation in a negligence case for injuries resulting from a soft drink bottle explosion). However, contract law professors know that placing an item on a shelf is like a price quote, advertisement, or invitation to bid, leaving the customer to make the actual offer by bringing the item to the store clerk for purchase. Eric A. Posner, *ProCD v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1181 (2010) (Judge Easterbrook's statement "is contrary to the general rule that advertisements and the display of goods are invitations for offers."); Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 839-40 (2007) ("[P]ayment for the software constitute[s] an offer that the store would accept by taking payment (as typically understood under traditional contract law)." (citing Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 *TOURO L. REV.* 1205, 1226 (2000) ("[A]s 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.'")); see also *Klecek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000) ("In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree.").

56. *ProCD*, 86 F.3d at 1449-50.

57. *Id.* at 1450.

58. *Id.* at 1451.

period after being made aware of the terms.<sup>59</sup> This is a classic case of putting the cart before the horse.

Rather than resolve the case through the mechanism established in the Uniform Commercial Code (U.C.C.) for dealing with later additions of new and different terms,<sup>60</sup> Judge Easterbrook first articulated the result he believed he had to obtain for purposes of supporting market economics, and then simply declared that the terms were enforceable without much effort to locate a rule somewhere in traditional contract law.<sup>61</sup> His result has come to be called a “terms later” or “rolling” contract, characterized by what might be considered a series of offers and acceptances,<sup>62</sup> although that was not the explanation given by Judge Easterbrook.

Further, the assumptions upon which *ProCD* rests may not be realistic; Judge Easterbrook suggested that as long as the consumer has an opportunity to return the product within a stated number of days after the terms are revealed to the purchaser, it is not inconsistent with notions of voluntary assent to find that the consumer has manifested assent by purchasing the product and later finding the terms inside the package, or even later finding the terms when the disk is inserted in the computer.<sup>63</sup> However, real world practice may show that returning a small product through a retailer is impossible and returning it through the product manufacturer is such a hassle that it may as well be impossible. We are aware of no one who purchased boxed software and has successfully returned an opened product. Moreover, the plodding plug who does not get around to opening the box and loading the program for more than a month after the retail sales receipt will have a battle proving the product was returned within the time frame of thirty-days after reading the terms. Nonetheless, Judge Easterbrook seemingly has no qualms with binding that consumer anyway because some written promise that a product may be returned is enough for the non-return of the item to indicate the consumer’s final act of assent.<sup>64</sup>

Next, Judge Easterbrook describes the kind of market disaster that would flow from transactions where warranties are neither limited nor waived by contract, because there is no enforceable contract. In transactions “unfettered by terms,” sellers may be subject to “a broad warranty and must pay consequential damages for any shortfalls in

---

59. *Id.* at 1452-53.

60. U.C.C. § 2-207(2) (3) (2009).

61. *ProCD*, 86 F.3d at 1453-55.

62. *See, e.g.,* *Higgs v. Auto. Warranty Corp. of Am.*, 134 Fed. App’x. 828, 831 (6th Cir. 2005).

63. *ProCD*, 86 F.3d at 1451-52.

64. *See id.*

performance,” which “would drive prices through the ceiling or return transactions to the horse-and-buggy age.”<sup>65</sup> Thus, he asserts that an economic benefit of enforcing rolling contracts is that the software provider may waive or limit warranties. The risk to the software market because of warranties implied under the U.C.C. is somewhat less drastic than Judge Easterbrook fears. The applicability of the U.C.C. to items primarily purchased for the intangible intellectual property, rather than the tangible disk, is still disputed,<sup>66</sup> although, politics aside, it seems quite obvious that the “predominant purpose”<sup>67</sup> of the transaction, as well as the “gravamen”<sup>68</sup> of ProCD’s complaint lie squarely in intangible property and not in “goods” so the U.C.C. would not apply. Of course, warranties may perhaps arise outside of the U.C.C.<sup>69</sup>

More importantly, limiting the kinds of terms in adhesion form contracts that will be enforced, giving adequate notice of the included terms at formation, and requiring some knowing assent will not create the monster of transactions “unfettered by terms.”<sup>70</sup> A transaction can adhere to the principles of contract formation and the bounds of fairness without being stripped of all terms.

*ProCD* and the line of cases that have followed stress the economic inefficiencies that would result if the courts were to hold the parties to

65. *Id.* at 1452.

66. The Uniform Commercial Code (U.C.C.), Article 2, applicable to transactions in “goods,” implies warranties for product performance in any transaction for “goods.” §§ 2-314, 2-315 (1995). Under the proposed Revised U.C.C. Article 2, “information” is excluded from the definition of “goods,” and the official comments make clear that downloadable software is excluded. *See* U.C.C. § 2-103(1)(k) & cmt. 7 (2009). Although the revised Article 2 has been withdrawn, the existing definition implies that information is excluded because it is intangible. However, no consensus has formed on whether software delivered by disk is “goods” subject to Article 2 or even whether a license is a transaction in goods. *See* Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. 1103, 1120 (2008); *Systems Unlimited, Inc. v. Cisco Systems, Inc.*, 228 F. App’x 854, 854, 2007 WL 1047064 (11th Cir. 2007) (holding that the “sale of intellectual property was not a ‘transaction in goods’ subject to the U.C.C., under California law”); *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 29 n.13 (2d Cir. 2002) (noting the problems associated with applying the U.C.C. to software licensing). *But see*, *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991) (holding that the U.C.C. applies to contracts dealing in software); *Bray Intern., Inc. v. Computer Assocs. Inter.*, No. CIV H-02-0098, 2005 WL 3371875, at \*3 (S.D. Tex. 2005) (explaining that in Texas, the U.C.C. applies to software licensing); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 108 n.4 (Tex. Ct. App. 2000). For a thorough discussion of whether the U.C.C. applies to online access contracts, *see* Ray Nimmer, *A Modern Template For Discussion*, 2 DEPAUL BUS. & COM. L.J. 623 (2004).

67. For an explanation of the application of the predominant purpose test, *see* WILLISTON 4th, *supra* note 17, § 26:20.

68. WILLIAM D. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 2-102:04, at 12 (1984) (explaining the use of the gravamen test compared to the predominant purpose test).

69. Lothar Determann & Gary Shapiro, *Handling Open Source Software Risks In Commercial and M & A Transactions*, 956 PLI/PAT 227, 231–36 (Jan. Feb. 2009) (describing the kinds of implied warranties that arise even in open source transactions where no express warranties are made).

70. *ProCD v. Zeidenberg*, 86 F. 3d 1447, 1452 (7th Cir. 1996).

standards that would not allow contracting to be done in this way.<sup>71</sup> This idea is that the market efficiently produces products and services and that these quick contracts and loose requirements promote economic efficiency. Many commentators buy into these ideas, arguing that standard non-negotiable contracts presented in the ways they were in *ProCD* and are in TOS reduce transaction costs.<sup>72</sup> Others, however, argue that such contracts are counter-productive to promoting economic efficiency—that they actually cause negative behavior and reduce the effects of consistency and predictability that contract law is intended to provide.<sup>73</sup> However, the general trend over the last decade leans toward allowing whatever the lawyers for software companies think up for the sake of economic efficiency,<sup>74</sup> rather than put pressure on contract drafters to “carve some approximation of decent balance in its detail” as demanded by Karl Llewellyn.<sup>75</sup>

In *ProCD*, Easterbrook let his horse sense about what markets require trump the niceties of contract doctrine. If that isn’t an activist judge, what is? Judge Easterbrook’s temptation was not a new one. In the 1824 “unruly horse” case, Chief Justice Best pointedly held that the judges should not reach results they desire based on notions of what is best for society (i.e. public policy or market efficiency) but instead should only look to established law.<sup>76</sup> Courts do not have, “the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy.”<sup>77</sup>

Nonetheless, particularly in the context of applying contract law in technology transactions, subsequent courts have shown considerable deference to the importance of supporting an emerging technology/digital market, rather than pressuring businesses to draft non-

71. See *id.* at 1450–52.

72. See Lucian A. Bebechuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 829 (2006).

73. Roger C. Bern, “Terms Later” Contracting: *Bad Economics, Bad Morals, and a Bad Idea For a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 643–44 (2004) (arguing that Judge Easterbrook’s holding may actually “increase[] transaction costs, enhance[] hold-up or opportunistic behavior by vendors, and result[] in inefficiencies and as distributional unfairness by systematically redistributing wealth from consumers to vendors”); see also Glynn Lunney, *Protecting Digital Works: Copyright or Contract?*, 1 TUL. J. TECH. & INTELL. PROP. 1, 8 n.38 (1999) (“For ProCD to attempt such a price discrimination scheme, it must have some degree of monopoly in the market for telephone listings. Given such monopoly, there is little reason to expect the market to constrain effectively ProCD’s attempt to impose improper and inefficient terms in the use agreement.” (citing Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 659–62 (1979))).

74. See *infra* Part IV (discussing current court trends with respect to online agreements).

75. Llewellyn, *supra* note 1, at 703 n.7.

76. *Richardson v. Mellish*, (1824) 130 Eng. Rep. 294 (K.B.) 298; 2 Bing. 229, 240.

77. *Id.* at 299, 2 Bing. at 242.

negotiable contracts that reflect reasonable and fair terms.<sup>78</sup> Such deference seems most defensible when it is directed at protecting mental horse power, or the intellectual property interests, from those who would expropriate the significant investment of others in developing technological innovations, even when such material, like the database in *ProCD*, could not be copyrighted. Clearly, Matthew Zeidenberg should not be allowed to purchase a much subsidized consumer copy of a database developed with great time and expense so he could use it to take *ProCD*'s profitable customers. Such protection is especially important when the intellectual property is code or a digital copy that can be reproduced with almost no cost or effort and without losing quality. But now the zeal in protecting innovation and intellectual property through the enforcement of licensing terms is aimed with equal vigor at contract clauses covering matters unrelated to the limited license to use intellectual property.

The ideas generated from *ProCD* were not consistently received by other courts. For instance, in Utah in 1997, one federal district court rejected a similar licensing agreement where the terms arrived after purchase when the box was delivered.<sup>79</sup> The court suggested that Utah did not, and only a minority of the courts would ever, follow the Seventh Circuit's precedent in *ProCD*.<sup>80</sup> But over time the philosophical approach of *ProCD* went from a trot to a gallop. This may be a classic example of the *Kingston v. Preston* principle: a person of great renown or other hot credentials may either copy an earlier court or just get it wrong, but upon his saying so the idea becomes the cat's meow.<sup>81</sup> What subsequent courts seemed to remember about *ProCD* is the economic necessity of enforcing contracts to protect a technology market even if traditional contract doctrine is sacrificed in the process.<sup>82</sup> What most do not remember are the limitations of *ProCD*'s holding and the fact that the issue involved was theft of intellectual property rather than a full waiver of liability or the right to modify without notice.

In any event, greasing the skids for the powerful actors who take advantage of consumers may not be in society's interest. Certainly, European Union lawmakers are less willing to throw consumers to the

---

78. See, e.g., cases discussed in Part IV *infra*.

79. *Novell, Inc. v. Network Trade Ctr.*, 25 F. Supp. 2d 1218, 1230 (D. Utah 1997), *vacated in part on other grounds*, 187 F.R.D. 657 (D. Utah 1999).

80. *Id.*

81. "Horse's whinny" just didn't work.

82. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149-50 (7th Cir. 1997) (approving *ProCD* because of the practical benefits of not having to explain to each customer the meaning of terms and noting the need to acknowledge practical and economic considerations in contract law generally, not simply as it pertains to licensing agreements).

wolves.<sup>83</sup> The sense that *ProCD* somehow validated a brave new world of enforcing overreaching adhesive contracts against the powerless is not true.

### *B. Opening the Gateway for All Form Contracts*

One would think that Judge Easterbrook would get off his high horse there, but one year later in *Hill v. Gateway*,<sup>84</sup> Judge Easterbrook wrote another opinion in a case like *ProCD*. *Gateway* was similar to *ProCD* in that the terms arrived after contract formation and there was some technology involved (although this time it was hardware).<sup>85</sup> But this case was unlike *ProCD* in that the *Gateway* dispute had nothing to do with the technology or an expropriation of intellectual property. The Seventh Circuit could have distinguished this case, but instead it chose to ratify the principle of a “rolling” or “terms-later” contract, without offering much more in terms of doctrinal explanation.<sup>86</sup> In *Gateway*, Hill ordered merchandise over the phone and was not read, or told about, any specific terms.<sup>87</sup> Later Hill’s order arrived with accompanying terms that noted that the contract would be “accepted” and therefore effective if Hill did not return the order within thirty days.<sup>88</sup> Hill later complained about his order after the thirty-day period, and argued that he was given no proper notice of terms prior to his purchase and therefore should not be bound by the thirty-day deadline.<sup>89</sup>

Judge Easterbrook disagreed, finding this form of transaction to be economically necessary and sufficiently fair to the consumer who had the opportunity to review the terms and respond accordingly but simply failed to do so in this case.<sup>90</sup> The court further justified its decision through analogy, arguing that “[p]ayment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors” and claiming it was impractical to find a way to inform customers of all terms prior to product purchasing.<sup>91</sup>

Both *ProCD* and *Gateway* give particular punctuation to the importance of the technology market.<sup>92</sup> Judge Easterbrook relies on the

---

83. See Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting In The U.S. and EU*, 54 CLEV. ST. L. REV. 175 (2006).

84. 105 F.3d 1147 (7th Cir. 1997).

85. *Id.* at 1148.

86. *Id.* at 1150.

87. *Id.* at 1148.

88. *Id.*

89. *Id.*

90. *Id.* at 1149.

91. *Id.*

92. *Id.* at 1150; *ProCD v. Zeidenberg*, 86 F.3d 1447, 1449–50 (7th Cir. 1996).

assumption that such contracting serves economic efficiencies and, ultimately, reduces prices for customers and increases availability. These assumptions are strongly supported by some commentators.<sup>93</sup> Others are cynical about this economic analysis and the comparative weighing of business and consumer benefits.<sup>94</sup> Further, cost savings may increase profits rather than reduce price.

### C. *The Gate Keeper*

Following this discussion of *ProCD* morphed into *Gateway* is a good place to briefly tarry on the relevance of the opinions' author. Like Lord Mansfield, much of what Judge Easterbrook says gets attention merely because he said it. In 2006 Professor Elhauge made overt what many scholars know: "Judging by the literature, academic norms now require me to make the obligatory reference to Judge Easterbrook's famous disparaging quip comparing cyberlaw to the 'Law of the Horse.'"<sup>95</sup> Scholars are drawn to respond to Judge Easterbrook's opinions like fancy hats to the Kentucky Derby. The magnitude of law review citations is staggering: as of November 2011, 1,023 law review and journal articles cite *ProCD*,<sup>96</sup> and 464 law review articles cite *Gateway*.<sup>97</sup> One such article, entitled "*Terms Later*" *Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*,<sup>98</sup> captures the essence of the situation; the author felt compelled to frame his economics analysis against Judge Easterbrook who takes a prominent and conspicuous personal role alongside the issue. Had a less iconic figure opined on the subject, the title could have been three words shorter.<sup>99</sup>

As an example, scholars feel pressure to respond to every facet of Judge Easterbrook's cyberlaw analysis including his famous, cyber-horse comparison. Judge Easterbrook's analogy of cyberlaw to "the law of the

---

93. See Bebchuk & Posner, *supra* note 72, at 828–29 (arguing that there are advantages lower transaction and agency costs, which lead to lower-priced goods and services to having standard non-negotiable contracts in a competitive marketplace, and claiming that the majority of courts agree and therefore are willing to enforce contracts of adhesion).

94. See *supra* note 73.

95. Einer R. Elhauge, *Can Health Law Become a Coherent Field of Law?*, 41 WAKE FOREST L. REV. 365, 368 (2006).

96. Data was gathered using WestlawNext search for "86 F.3d 1447." See <https://a.next.westlaw.com> (follow "Citing References" hyperlink; select "Secondary Sources" hyperlink; select "Law Reviews" hyperlink) (last visited Nov. 14, 2011).

97. Data was gathered using WestlawNext search for "105 F.3d 1147." See <https://a.next.westlaw.com> (follow "Citing References" hyperlink; select "Secondary Sources" hyperlink; select "Law Reviews" hyperlink) (last visited Nov. 14, 2011).

98. Bern, *supra* note 73.

99. And shorter means more citations as it is faster to type.



horse” seems to require scholars to justify themselves against his criticism that whatever field they are touting is too narrow.<sup>100</sup> Based on this quip, one scholar discusses whether the law of the horse exists<sup>101</sup>—a question that would surely not have been asked, let alone answered in detail, except for Judge Easterbrook uttering the magic phrase. Essentially, Judge Easterbrook’s touch turned something as innocuous and mild as horse law into a standard simply because the phrase came straight from the horse’s mouth.<sup>102</sup>

Many scholars feel forced to justify their views against Judge Easterbrook’s passing statement, thus, the near violent response to Judge Easterbrook’s criticism. Interestingly, a well-crafted and researched criticism from another source has fleeting effect—shorter than a horse race.<sup>103</sup> Some scholars have couched their entire thesis in terms of Judge Easterbrook’s observations.<sup>104</sup>

### III. A VET’S PRE-PURCHASE EXAMINATION OF UNRULY TOS

In spite of the warning “don’t look at gift horse in the mouth,” *Equine Legal Solutions* tells us that “[i]f you are acquiring a horse, you should have a pre-purchase veterinary examination. Period. Even if the horse is free.”<sup>105</sup> No better advice could be given a person thinking of purchasing online products or services, even if the services are free. The recommended veterinary examination isn’t always a pretty thing. Aside

---

100. See, e.g., Elhauge, *supra* note 95; James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 5 n.7 (explaining that his thesis is not undermined by Judge Easterbrook’s law-of-the-horse standard because the claim of the paper is not that there should be a distinct body of search engine law); Marcelo Halpern & Ajay K. Mehrotra, *Exploring Legal Boundaries Within Cyberspace: What Law Controls in a Global Marketplace?*, 21 U. PA. J. INT’L ECON. L. 523, 534 (2000) (disagreeing with Judge Easterbrook by arguing that “the Internet should be approached and respected as a unique place with its own set of social norms and community standards”); Kenneth D. Katkin, *Cyber Law: Problems of Internet Governance*, 28 N. KY. L. REV. 656, 656-57 (2001) (attacking “Judge Easterbrook’s use of equestrian law as the paradigmatic example of a subject so excessively shallow and narrow that it cannot yield any unifying principles when studied”).

101. Darian M. Ibrahim & D. Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71, 76-77 (2008).

102. Cheryl B. Preston, *CyberInfants*, 39 PEPP. L. REV. 225, 230 n.29 (2012) (briefly describing the “tortured interchange” spurred by Judge Easterbrook’s article citing responses and responses to the responses).

103. See, e.g., Ann Bartow, Review, *A Portrait of the Internet as a Young Man*, 108 MICH. L. REV. 1079, 1099 (2010) (noting that “the community of cyberlaw scholars that [others] pay[] attention to is small . . . . The cyberlaw discourse among legal scholars has been insular from the very beginning of the field . . . .”).

104. See, e.g., Eric Goldman, *Teaching Cyberlaw*, 52 ST. LOUIS U. L.J. 749, 749-50 (explaining that “Judge Easterbrook’s observations were correct” but finding that “Judge Easterbrook reached the wrong conclusion”).

105. *Pre-Purchase Veterinary Exams*, EQUINE LEGAL SOLUTIONS, <http://www.equinelegalsolutions.com/pre-purchasevetexams.html> (last visited Oct. 28, 2011).

from looking in a horse's mouth to see if it is "long in the tooth,"<sup>106</sup> blood, urine, and other bodily fluids are involved.<sup>107</sup> But it needs to be done.

In this Part we define, dissect, and trace the evolution of the unruly horse that is a TOS. This Part discusses the progress of adhesion contracting onto the Internet, first as clickwrap agreements and then browsewrap agreements. We begin by briefly explaining what each of these general terms encompasses, and what acts operate as the supposed manifestation of assent online. Then we briefly consider the kinds of terms regularly included in TOS. We conclude with a comparison of online contracting and the realities of contracting in the pre-Internet world in which various core legal doctrines have developed and are now warped.

#### A. "Stocking Up" on Polo Wraps<sup>108</sup>

Courts began first to deal with online transacting after a movement involving sales of compactly packaged software on a disc (encased with more legal terms than a bad episode of Law and Order). Enamored with Judge Easterbrook and remembering the bare holding of *ProCD* rather than the full context, courts embraced rolling contracts, excusing criticism that the customer did not even have access to the agreement until after contract formation. As we will now discuss, courts justified this seemingly counter-intuitive paradox by using many of the same economic arguments already used to justify standard form contracts for decades.

As a matter of definition, "clickwrap agreements" require users to click a link before proceeding to use the services or place an order. Originally, clickwraps typically required the user to knowingly move a cursor and click a link clearly labeled to indicate that a click would constitute acceptance of terms that were shown. But even with a clearly

---

106. This means too old. "Horses's teeth, unlike humans', continue to grow with age. They also wear down with use, but the changes in the characteristics of the teeth over time make it possible to make a rough estimate of a horse's age by examining them. There are various similar Latin phrases dating back to the 16th century. The gap between these and the first citation of the English version – in 1852, make it likely that 'long in the tooth' was coined independently from those earlier Latin sayings. That earliest citation is in Thackeray's *The History of Henry Esmond, Esq.* and refers to a woman rather than a horse . . . ." THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/long-in-the-tooth.html> (last visited Oct. 28, 2011).

107. For instance, Equine Legal Solutions suggests: "For all stallions, even colts of a relatively young age, this examination should include whether both testicles have descended. For stallions of breeding age (e.g., two years old and older), semen should be collected and tested for viability and motility." *Pre-Purchase Veterinary Exams*, *supra* note 105.

108. Katherine Blocksdorf, *Choosing Leg Wraps or Bandages*, About.com Horses, available at <http://horses.about.com/od/choosingandusingtack/a/choosinglegwrapsorbandages.htm> (last visited Oct. 28, 2011).

communicated set of terms and a clearly labeled button, commentators have questioned how a mere click is the equivalent to signing an agreement in paper contracting.<sup>109</sup> The general term has stuck and been applied by some to any click on any term that suggests moving forward to another page,<sup>110</sup> even if terms are nowhere to be seen and the button is labeled with only “continue” or some other words unrelated to becoming legally bound. Although a few webpages take steps to encourage users to actually see some of the terms and maybe even scroll through them, many webpages do not show the terms and some give little clue about where to find the terms that supposedly leap into effect with a click, as we will discuss in part B below.

Some webpages do not require the consumer to click to accept an agreement. The online service providers claim that by using the page the user became legally bound to a contract subject to extensive terms that exist somewhere on the website, but not necessarily on a page that the user will see in the ordinary course. Browsewrap agreements are TOS that purport, by their own terms, to become binding against anyone using the site.<sup>111</sup> The idea is that by “browsing” the site, the user enters a contract, but this legal consequence need not be brought to the user’s attention either before or after browsing, and although the courts insist that some “notice” be given of the existence of the terms supposedly incorporated into this contractual arrangement,<sup>112</sup> courts may not require the terms to be located anywhere very conspicuous. Somewhere in the TOS the online service provider will mention that merely using the services indicates acceptance of all of the terms found in that TOS. Of course, there are various degrees of browsewrap terms; some are well hidden while others are behind a clear and obvious link on a homepage or even located several places on the website.<sup>113</sup>

Despite the reality that consumers tend not to read these agreements, courts have consistently upheld online standard form contracts, finding

---

109. See, e.g., Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2005-2006*, 62 BUS. LAW. 195, 203 (2006) (arguing that for an online agreement to satisfy traditional paper contract rules where no signature is required, the terms must be visible enough to meet a “reasonable communicativeness” test (citing Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1337-40 (2005))).

110. See *infra* Part IV (discussing court treatment of clickwrap agreements).

111. See *Major v. McCallister*, 302 S.W.3d 227 (Mo. Ct. App. 2009) (finding that a website user was bound to a browsewrap agreement because there was explicit notice that terms existed and that a person was bound to those terms by using the services, although the consumer was never asked to click-to-accept).

112. See *Specht v. Netscape Comm’ns Corp.*, 306 F.3d 17 (2d Cir. 2002), for a landmark case discussing notice requirements for online agreements and, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004), which follows *Specht* in assuming the importance of notice in online agreements.

113. See *infra* Part III.B.

sufficient assent.<sup>114</sup> Professor Schmitz recently noted that the trend for courts to hold consumers responsible for reading their contracts has the effect of stripping the service provider of any duty to inform consumers about specific strong terms within the agreement.<sup>115</sup> That is, if the contract is going to be enforced whether or not it was read, there may not be much motivation to make the contract conspicuous. If this is true, this may be the reason that so many consumers in online contract dispute cases did not merely fail to read the terms but actually claim they never knew the terms existed in the first place.

### *B. Putting Your Foot in the Stirrup*

Recently we conducted a study to identify trends in exactly what “manifestations” were required for online contract formation. Our study dissected the account creation process of eight common service providers. These eight service providers are merely illustrations and they are not the most extreme or noteworthy examples we found. We chose the service providers listed here only because they are key players in the industry. We do not claim this study is comprehensive, nor does it target any of the service providers we suspect are the worst offenders. The service providers included are: Gmail,<sup>116</sup> MSN,<sup>117</sup> Facebook,<sup>118</sup> Yahoo!,<sup>119</sup> Myspace,<sup>120</sup> eBay,<sup>121</sup> Twitter,<sup>122</sup> and Amazon.<sup>123</sup> The websites

---

114. *E.g., see* *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002) (explaining that consumers do have a responsibility to read their contracts and a mere failure to read is not a valid defense to contract formation); *University of Miami v. Intuitive Surgical, Inc.*, 166 F. App'x 450 (11th Cir. 2006) (failing to read the contract is no excuse); *Great N. Ins. Co. v. ADT Sec. Serv., Inc.*, 517 F. Supp. 2d 723 (W.D. Pa. 2007) (same); *Klopp v. Deere*, 510 F. Supp. 807, 811 (E.D. Pa. 1981) (same); *Schillachi v. Flying Dutchman Motorcycle Club*, 751 F. Supp. 1169 (E.D. Pa. 1990) (quoting 8 PENNSYLVANIA LAW ENCYCLOPEDIA § 83, page 82) (“It is common sense and an accepted rule of law that a person has a duty to read the contract before executing it, and his failure to do so will not excuse his ignorance of the contents.”). For a discussion on the effect this result is having on encouraging consumers not to read contracts, see Cheryl B. Preston & Eli W. McCann, *Ignorance is Clicks* (forthcoming).

115. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 125 (2010) (explaining “assent challenges face high hurdles because most courts agree that consumers are responsible for reading their contracts and there is no duty to inform customers explicitly about arbitration provisions” (citing *Torrance*, 242 F. Supp. 2d at 169–70; Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 619–23 (2009))).

116. GMAIL, <http://gmail.com> (last visited Oct. 6, 2011).

117. MSN, <http://www.msn.com> (last visited Oct. 6, 2011).

118. FACEBOOK, <http://www.facebook.com> (last visited Oct. 6, 2011).

119. YAHOO!, <http://www.yahoo.com> (last visited Oct. 6, 2011).

120. MYSPACE, <http://www.myspace.com> (last visited Oct. 6, 2011).

121. EBAY, <http://www.ebay.com> (last visited Oct. 6, 2011).

122. TWITTER, <http://www.twitter.com> (last visited Oct. 6, 2011).

123. AMAZON, <http://www.amazon.com> (last visited Oct. 6, 2011).

we viewed contained both browsewrap and clickwrap contracts. Table 1 below charts a variety of approaches to contract formation among the eight webpages. Of the eight online service providers examined, none require or allow actual assent to specific individual terms, even where those terms are particularly onerous (i.e. arbitration agreements, unilateral modification, non-transferability of rights, surrender of intellectual property rights, etc.). Most, but not all, of the sites do, however, require the consumer at least to click on some block or link (which we refer to as a “button”). The buttons have variations in their identification or text, some indicating only acknowledgment of account creation. These distinctions are discussed below in greater detail.

Table 1: Process of Accepting Online Contract Terms of Service (“TOS”)

	Gmail	MSN	Facebook	Yahoo!	Myspace	eBay	Twitter	Amazon
“I Accept” Button	√	√				√		
Scroll Box	√						√	
Separate Link to TOS	√	√	√	√	√	√	√	√
Words Indicating What Is Accepted	√	√	√*	√	√*	√	√	
Notification of TOS Above Button	√	√		√		√	√	
Notification of TOS Below Button			√		√	√		

\*In addition, the print is small and inconspicuous

Gmail, MSN, and eBay each have the words “I accept” on a button, making it relatively obvious that a click demonstrates some sort of agreement or consent. A more difficult question is the extent to which the “I accept” is linked to a specific set of terms implicated by the click. The studied service providers vary in how they provide access to their respective TOS terms. Of these three that have an “I accept” button, only Gmail contains the TOS agreement in a scroll box on the page where the “I accept” button exists. This positioning means that the user is visually confronted with typed language and a sense that there is more than the opening sentence because a scroll bar is included. In addition, Gmail provides another way to access the TOS in a larger window (rather than using the small scroll box) with two different links identified as

“printable version” and “Terms of Service” placed right above the “I accept” button. MSN and eBay do not show the terms, but provide only a hyperlink to another page with text. MSN places this hyperlink right above the “I accept” button. eBay places a hyperlink above the button as well, but it includes three bits of the agreement near where a user clicks, but the button reads “Continue.” These include a representation that “I am at least 18 years old.” The inclusions of these three specifics creates another issue since the user may think these are the most important or most onerous terms as their attention has been focused on them. This is a powerful signal that the other terms are not important or are just “standard,” which for a consumer means “reasonable” and “minimal.”

Facebook, Yahoo!, Myspace, and Twitter each require the consumer to click a button that reads “create my account” or “sign up” rather than “I accept.” These service providers do not include a visual of the text of the TOS on the page with the button, but only a separate link behind text saying “Terms of Use” or “Terms of Service.” Yahoo! and Twitter have a separate link directly above the “create my account” button and a sentence stating that clicking the “create my account” button is interpreted as acceptance to these terms. Both Facebook and Myspace, on the other hand, insert this notification and these links in very small print below the “Create My Account” button. A person whose screen shows the place to click would not necessarily have the other link and sentence on the screen simultaneously or may easily stop scrolling the screen at the point where the “create my account” click is required.

We conducted this study of these eight service providers from the perspective of an individual who is interested in becoming a member and creating an online account. However, Myspace claims to expand the authority of its TOS to “visitors” as well as members.<sup>124</sup> “Visitors” to the site are not presented with any language explaining this risk or the service provider’s intended consequence or any clearly identifiable button on which to click, whether or not tied to a link to the text of the terms. Myspace’s TOS therefore has both clickwrap and browsewrap aspects to the contracts it attempts to form on its webpage.

Similar to Myspace’s treatment of “visitors,” Amazon’s treatment of “members” not only omits language revealing that acceptance to terms will occur by any particular act such as clicking, or has already occurred, it also fails to notify the consumer when account creation itself has taken

---

124. *Terms of Use Agreement*, MYSPACE (June 25, 2009), <http://www.myspace.com/Help/Terms> (last visited Sep. 22, 2011) [hereinafter Myspace TOS]. The Myspace TOS defines “visitors” as those who “simply browse the Myspace Services, including, without limitation, through a mobile or other wireless device, or otherwise use the Myspace Services without being registered.” *Id.*

place.<sup>125</sup> Rather, the consumer is invited to enter some information and click a button that merely says “Continue.”<sup>126</sup> Nowhere during this data-entry stage is there any indication that a TOS exists or that the consumer is accepting *any* terms. Once the consumer clicks the “Continue” button, she is taken to a page welcoming the new customer to Amazon; on this page, there is still no notification that any terms exist or have been accepted. However, on the very bottom of the page, in the middle of almost two-dozen options of small hyperlinked print is a fairly obscure way for the truly determined to access the full text of an otherwise-unidentified TOS agreement.<sup>127</sup> After following this to another page, on the third line of the TOS, in bold print, Amazon declares, “[i]f you visit or shop at Amazon.com, you accept these conditions.”<sup>128</sup> Note that this claim includes visitors as well as those with existing accounts.

This sampling of eight websites demonstrates that, even in cases where the court might label the contract as a clickwrap, reasonable Internet users may be unaware that they have entered a contract, not to mention the content of its terms. The average consumer could easily pass through the Amazon account creation process without ever thinking that she has entered into a binding agreement. In the cases where it is more obvious, it is still not farfetched to imagine that a consumer could easily whiz through account creation without ever noticing a short sentence in small print containing a hyperlink to a TOS to which she will be bound. Nonetheless, all of these service providers have a TOS full of terms that limit the consumer’s rights in significant ways.

The eight websites discussed above were chosen at random without reviewing their terms in advance. The terms these contain are not out of the ordinary for TOS across a wide variety of online service providers.

### *C. Content Viability and Motility*<sup>129</sup>

Many TOS are full of terms that are quite onerous and even overreaching but are not being thrown out by courts on the basis of unconscionability. The problems to the consumer that come with these powerful terms are only magnified in the online context where consumers are even less cognizant that they are agreeing to give up

125. AMAZON, <http://www.amazon.com> (last visited Oct. 6, 2011).

126. Because the consumer must actually provide personal information and click to “continue” to see each part of this process, there is no working URL we can provide beyond the initial account setup page. However, the reader can find the beginning of the account setup process at Amazon.com under the link, “New customer? Start here.”

127. AMAZON, *supra* note 125.

128. *Id.*

at

[http://www.amazon.com/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=508088](http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088).

129. See *Pre-Purchase Veterinary Exams*, *supra* note 105.

significant rights. We briefly highlight a handful of common provisions found in TOS agreements.<sup>130</sup>

### 1. *Unilateral modification*

Of particular note is a common but onerous right to unilateral modification. Generally, after a contract is formed, for proper contract modification to occur the agreement to modify the “contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration. Hence, one party to a contract may not unilaterally alter its terms.”<sup>131</sup> Nonetheless, many TOS agreements contain terms eliminating the consumer’s rights in this area, granting the service provider full power to alter the TOS without going through the steps required for a “valid original contract.”<sup>132</sup> Of course, in doing so, the online service provider does not allow the consumer the same luxury of changing the contract at will, but instead retains the unilateral modification power exclusively for itself. These unilateral modification clauses have become more common in TOS and courts have responded to them in a variety of ways, often enforcing them, even where the online service provider reserves no obligation to inform the consumer of the unilateral changes.<sup>133</sup>

When an online service provider reserves the right to modify the terms of an agreement unilaterally, it grants itself an almost unlimited contracting power. Utilizing this one contract term is akin to using one wish to wish for infinite additional wishes. At least one commentator has argued that unilateral modification clauses make the other promises in the contract completely illusory, as this term essentially asserts that the online service provider will only be bound to the terms in the TOS for as

---

130. For a more detailed discussion of the types of terms commonly found in TOS agreements, see Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 HAMLINE L. REV. 499 (2003); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447 (2008).

131. 17A AM. JUR. 2D *Contracts* § 507 (2010).

132. *Id.*

133. For a discussion on several examples of online service providers using unilateral modification clauses and court responses to these clauses, see David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010). Horton’s article notes various types of unilateral modification clauses and the varying degrees of obligations the online service provider retains in informing the consumer of changes. Some online service providers, for example, have sent regular communication to consumers, offering a grace period in which the consumer may reject contract changes, while others simply alter the terms and leave it up to the consumer to notice the changes. *Id.* In one case with AT&T, the online service provider had altered its terms so frequently that by the time litigation over the services ensued, not even AT&T’s lawyers were sure which terms actually applied. *Id.* at 605–06.



long as the online service provider decides not to change those terms.<sup>134</sup> Not surprisingly, commentators have observed the increasingly aggressive use of this tactic by online service providers as courts have become willing to enforce unilateral modification clauses.<sup>135</sup>

We found these clauses in our study. Myspace's TOS notes, "Myspace reserves the right to modify this Agreement at any time . . . . Your continued use of the Myspace Services following any such modification constitutes your agreement to be bound by and your acceptance of the Agreement as so modified."<sup>136</sup> The Myspace TOS further explains that it is the consumer's obligation to read the TOS regularly to make sure she still agrees to all of the terms.<sup>137</sup> Because there is no promise within the TOS that Myspace will provide any notice of changes,<sup>138</sup> Myspace has granted itself authority to alter any term at any time without providing notice.<sup>139</sup> Enforced literally, this provision essentially means that Myspace could insert in its TOS *enforceable* terms anywhere from requiring an unsuspecting consumer to begin paying fees for certain kinds of posts<sup>140</sup> to requiring any claim against Myspace be brought within ninety days. The consumer is supposedly bound by these new terms as soon as she enters the site following a change. For a conscientious user, logging on each time would require re-reading the terms and comparing them to the prior draft.

Twitter contains a similar provision to the one found in the Myspace TOS but explains that Twitter will notify the consumer if it, in its "sole discretion," deems the modification to be "material."<sup>141</sup> The Amazon TOS contains a modification clause with essentially the same practical effect as the one found in Twitter's contract.<sup>142</sup> No explanation of, or

---

134. Michael L. DeMichele & Richard A. Bales, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 63 (2006).

135. Horton, *supra* note 133; KENT D. STUCKEY, INTERNET AND ONLINE LAW § 1.02[.5](d) (2011) (arguing that unilateral modification clauses are becoming so popular *because* courts are enforcing them); Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1 (2010) (opining that consumers are generally clueless about the risks of unilateral modification clauses and that even if they were aware, they could not do much about them as courts are upholding them and they are too pervasive in TOS to avoid).

136. Myspace TOS, *supra* note 124.

137. *Id.*

138. *Id.*

139. *Id.*

140. Interestingly, Facebook's TOS explicitly states that it does "not guarantee" that its services "will always be free." *Statement of Rights and Responsibilities*, FACEBOOK (April 26, 2011), <http://www.facebook.com/terms.php> (last visited Sep. 22, 2011) [hereinafter Facebook TOS].

141. *Terms of Service*, TWITTER (June 1, 2011), <http://twitter.com/tos> (last visited Sep. 2011) [hereinafter Twitter TOS].

142. *Conditions of Use*, AMAZON (Aug. 19, 2011), <http://www.amazon.com/agreement/> (last visited Sep. 2011) [hereinafter Amazon TOS] (select "Conditions of Use" at the bottom of the page) (explaining that Amazon "reserve[s] the right to make changes to [its] site, policies, and these Conditions of Use at any time.").

boundaries on, such discretion is given in the terms or on the webpages.

These unilateral modification clauses add a critical layer to the problems of lack of notice and unequal bargaining power. Not only are the consumers likely unaware that such a term exists, most would not understand its full implications even if it were printed in red text on the home page. Whatever fiction courts believe about clicking as an indication of consent (or opening an account as an indication of consent to terms), surely no rational consumer intends to give knowing assent to anything the service providers deems to impose now or in the future without notice.

If the service provider can change the contract at will, why bother to call it a contract at all? Call it what it is: not private ordering but private imposition—the unfettered right of online service providers to dictate to anyone who visits their site any legal limitations, conditions, and responsibilities it elects from time to time.

## 2. *Jury waivers, venue restrictions, and arbitration clauses*

Jury waivers, venue restrictions, and arbitration clauses are also commonly found in TOS agreements. The Myspace TOS, for example, contains a term acknowledging that the consumer waives all rights to trial by jury for any litigation resulting from the use of its services and further restricts all conflict resolution to the jurisdiction of New York.<sup>143</sup> eBay explains that by accepting its TOS, the consumer agrees to resolve any dispute either in “the courts located within Santa Clara County” or through arbitration if the claim is under \$10,000.<sup>144</sup> The Amazon TOS contains a term subjecting the consumer to personal jurisdiction in the state of Washington and demanding that all disputes will be settled within Washington courts.<sup>145</sup>

Naturally a TOS creates an opportunity for service providers to choose locations and dispute resolution mechanisms that are most economical for them, and part of the economics of the provider’s decisions may come down to choosing the options that discourages the greatest number of consumers from pursuing claims. Although arbitration clauses are generally enforceable, no one suggests such clauses are not material and of extraordinary consequences. In the TOS context the seriousness of such clauses is vastly magnified by the increased failures of notice and broad interpretations of what actions constitute contractual consent.

---

143. Myspace TOS, *supra* note 124.

144. *Your User Agreement*, EBAY (Sept. 7, 2010), <http://pages.ebay.com/help/policies/user-agreement.html>.

145. Amazon TOS, *supra* note 142.

### 3. *Transferability and rights of survivorship*

Some TOS prohibit transferability and rights of survivorship. Accompanying some of these restrictions are statements granting power to the online service providers to permanently delete account content in certain circumstances. For example, Yahoo!'s TOS explains that Yahoo! will not engage in transferring contents or granting access upon the death of the account holder.<sup>146</sup> As a result, Yahoo! has the right to delete any contents upon notice of death according to its TOS.<sup>147</sup> Additionally, all rights to the Yahoo! ID are extinguished upon death.<sup>148</sup> Similarly, MSN's TOS notes that upon termination or cancellation of an account by either party, MSN may permanently delete any of the consumer's content.<sup>149</sup>

While many users may want all content deleted upon death, many would not want this result and would be stunned to discover the application of such a clause. Information about banking and other accounts, pending business commitments, reservations or schedules, and similar information may be critical to surviving spouses, partners, and employers when a person suddenly is taken.

### 4. *Creative rights*

Common, particularly among social networking sites, are terms in the TOS noting that the user grants rights to content posted on the site, which can be used by the online service provider. For example, Facebook explains that "[f]or content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission . . . : you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook."<sup>150</sup> Further Facebook mentions, "[w]e always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them."<sup>151</sup>

Twitter contains essentially the same term, listing a few ways Twitter may use content posted on its site: "By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy,

---

146. *Yahoo! Terms of Service*, YAHOO! (Nov. 24, 2008), <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>.

147. *Id.*

148. *Id.*

149. *Microsoft Service Agreement*, MSN (Aug. 31, 2010), <http://explore.live.com/microsoft-service-agreement?mkt=en-us>.

150. See Facebook TOS, *supra* note 140.

151. *Id.*

reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).”<sup>152</sup>

### 5. *Comparing a real horse to a virtual horse*

Courts have found increasingly less conscious forms of notice and assent to be binding online, while seemingly ignoring the characteristics of online transactions that suggest contract doctrine should be even more tightly applied online than in the real world. As Professor Preston explained in detail elsewhere, the Internet creates circumstances that are different from traditional real world contracting and that carry significance in any meaningful discussion of the enforceability of TOS.<sup>153</sup> For instance, the ease with which online service providers can store terms electronically encourages these contract drafters to include as much language as possible. As Professor Hillman has argued, consumers may choose online transactions because they want the result immediately and are accustomed to the speed of the Internet; thus they are less likely to stop to read and evaluate the fine print.<sup>154</sup>

There are no space concerns that pressure online service providers to keep the terms to a minimum or to be more concise with term explanations. Further, because consumers do not actually see or hold a tangible contract when transacting online, they miss out on the cautionary function that being handed a heavy stack of terms might provide; thus, again, online service providers are not motivated to cut back terms for fear that a consumer will balk at the vast number of words or pages in the contract. Typically this interest is balanced against the contract drafter’s interest in including as many limiting terms beneficial to the drafter as possible.

Additionally, contracting in general has evolved so drastically over the last two decades that acceptance of an agreement may no longer have the same significance as it did pre-Internet.<sup>155</sup> Consumers are entering into contracts on such a regular basis that it is no longer a significant event to assent to an agreement, as it may have been before products and services became so available through the Internet. And beyond the sheer number of contracts, the lack of formalities in contract acceptance online

---

152. Twitter TOS, *supra* note 141.

153. For a more detailed discussion of these differences, see Preston, *supra* note 102.

154. Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

155. Susan E. Gindin, *Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC’s Action Against Sears*, 8 NW. J. TECH. & INTELL. PROP. 1, 7, 24 (2009) (noting that consumers do not read online contracts and understand what they contain); Hillman, *supra* note 154, at 840–904.

further strip the consumer of awareness she may have had in traditional paper contracting where the parties might drive to a meeting-place, thumb through documents, and apply a physical signature. Rather, with online contracting, the consumer can sit at her computer in her sweats and immediately begin using online services by merely clicking a button. Little time or effort is involved during which a customer might reconsider. Even if she did take the time and effort to read through the agreement, she does not have much chance of finding someone who can explain it and less chance of negotiating any changes.

#### IV. CURRENT COURTS UNDER WRAPS

Emerging from the early clickwrap and browsewrap cases and commentary is a general consensus that signing an agreement or otherwise explicitly declaring assent is unnecessary so long as there is sufficient *notice* of terms and sufficient opportunity to read those terms. In assessing how courts have applied economic efficiency concerns to online contracting, *Southwest Airlines Co. v. BoardFirst, L.L.C.* explained in 2007, “[t]hough the outcomes in [browsewrap] cases are mixed, one general principle that emerges is that the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site’s terms and conditions prior to using the site.”<sup>156</sup> Courts have applied this analysis to clickwrap agreements as well.<sup>157</sup>

When Judge Sotomayor handed down her opinion in *Specht* in 2002, she explained that the enforceability of these agreements could really only be justified where the user should reasonably know what she is doing when she enters the site or clicks to accept.<sup>158</sup> This caution has eroded over the last decade, however, as courts have become more and more comfortable with enforcing online agreements almost regardless of the conspicuousness of terms.

##### *A. The Case Law*

The early courts quickly scrambled to identify whether there was proper notice as the basis for finding proper formation. But recently many courts and commentators seem to be willing to go even a step further by assuming the notice is inherent in any typical clickwrap agreement. That is, many courts seem willing today to accept as a

---

156. No. 06-CV-0891-B, 2007 WL 4823761, at \*5 (N.D. Tex. Sept. 12, 2007).

157. See *Specht v. Netscape Comm’n’s Corp.*, 306 F.3d 17 (2d Cir. 2002); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

158. *Specht*, 306 F.3d at 29.

baseline that people should just generally be on notice that TOS exist when they interact online and thus clickwraps are presumably enforceable unless strong evidence to the contrary is shown. Some courts state this presumption by merely declaring clickwrap agreements to be generally enforceable and moving on to address other issues in the case.<sup>159</sup> Others also use this presumption as a baseline but try to go a step further by attempting to explain why clickwrap agreements are or should be presumptively valid.<sup>160</sup>

Some of these cases claim to qualify their acceptance of clickwrap agreements by explaining under which circumstances clickwrap agreements are enforceable, but the explanation virtually encompasses all clickwraps anyway.<sup>161</sup> For example, in August 2011 a district court in California declared the state of the law according to “recent case law” to be that access to terms plus “requiring a user to affirmatively accept the terms, even if the terms are not presented on the same page as the acceptance button, are sufficient.”<sup>162</sup> A closer look at this explanation proves that this court merely stated the standard definition of a

---

159. See, e.g., *Centrifugal Force, Inc. v. Softnet Commc’n, Inc.*, No. 08 Civ. 5463(CM) (GWG), 2011 WL 744732, at \*7 (S.D.N.Y. Mar. 1, 2011) (“In New York, clickwrap agreements are valid and enforceable contracts.” (citing *Moore v. Microsoft Corp.*, 741 N.Y.S.3d 91, 92 (N.Y. App. Div. 2002))); *Schnabel v. Trilegiant Corp.*, No. 3:10-CV-957 JSII, 2011 WL 797505, at \*6 n.8 (D. Conn. Feb. 24, 2011) (“Clickwrap contracts are ubiquitous and have been consistently upheld by courts.” (quoting *Specht*, 306 F.3d at 26)); *Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367, 1369 (S.D. Fla. 2011) (“In Florida and the federal circuits . . . clickwrap agreements are valid and enforceable contracts.” (quoting *Salco Distribs., L.L.C. v. iCode, Inc.*, No. 8:05 CV 642 T 27TGW, 2006 WL 449156, at \*2 (M.D. Fla. Feb. 22, 2006))); *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213 (D. Haw. 2010) (citing a number of cases since the early 2000s to establish that across the country, clickwrap agreements are generally enforceable); *Meier v. Midwest Recreational Clearinghouse, L.L.C.*, No. 2:10-cv-01026-MCE-GGH, 2010 WL 2738921 (E.D. Cal. July 12, 2010) (forum selection clause in TOS is not invalid simply because it is in a clickwrap agreement; clickwrap agreements have been consistently held to be enforceable by courts in recent years); *Exceptional Urgent Care Ctr. I, Inc. v. Protomed Med. Mgmt. Corp.*, No. 5:08-cv-284-Oc-10GRJ, 2009 WL 1370818, at \*10 (M.D. Fla. May 14, 2009) (“There is also no dispute over the validity of clickwrap agreements . . .”); *Jackson v. Am. Plaza Corp.*, No. 08 Civ. 8980 (PKC), 2009 WL 1158829 (S.D.N.Y. Apr. 28, 2009) (assuming that clickwrap agreements are generally enforceable and no one argues that point anymore).

160. *Van Tassell v. United Mktg. Grp., L.L.C.*, No. 10 C 2675, 2011 WL 2632727, at \*15 (N.D. Ill. July 5, 2011) (“Because clickwrap agreements require affirmative action on the part of the user to manifest assent, courts regularly uphold their validity when challenged.” (citing Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 990 (2008))); *Hoffman v. Supplements Togo Mgmt. L.L.C.*, 18 A.3d 210 (N.J. Super. A.D. 2011) (stating that most courts assume that clickwrap agreements are enforceable so long as there is a button with some indication that says that one accepts by clicking).

161. *Grosvenor v. Quest Commc’ns Intern., Inc.*, No. 09-cv-2848-WDM-KMT, 2010 WL 3906253, at \*2 (D. Colo. Sept. 30, 2010) (“As a rule, a clickwrap is valid where the terms of the agreement appear on the same screen with the button the user must click . . .” (citing *Mortg. Plus, Inc. v. DocMagic, Inc.*, No. 03-2582-GTV-DJW, 2004 WL 2331918 (D. Kan. Aug. 23, 2004))); *Beard v. Paypal, Inc.*, No. 09-1339-JO, 2010 WL 654390 (D. Or. Feb. 19, 2010) (stating that clickwrap agreements are generally enforceable absent a showing of fraud).

162. *Swift v. Zynga Game Network, Inc.*, No. C-09-5443 EDL, 2011 WL 3419499, at \*6 (N.D. Cal. Aug. 4, 2011).

clickwrap. Thus, this court suggests that clickwrap agreements are valid only if they are clickwrap agreements.

Note, however, that while the majority of courts across the country tend to follow this pattern of thinking, some still hold strong to the *Specht* analysis and are willing to throw out online agreements that are not conspicuously noticed and entered. In May 2011, one New Jersey court held that the online service provider did not sufficiently make its contract available when it buried the link at the bottom of a scroll page.<sup>163</sup> But courts willing to invalidate any clickwrap are rare.

Looking at the clickwrap and browsewrap cases for 2009 through 2011, there is an obvious and dramatic trend for courts to agree that people should generally be aware that TOS exist and therefore everyone has “constructive” notice that terms are there somewhere. While consumers, if quizzed, would probably acknowledge that most web pages have terms somewhere, imposing a duty to hunt them out or bear the consequences of whatever they might say seems unreasonable. Think of the havoc such a doctrine would work in a wide variety of cases. For instance, under traditional contract law where a private individual offers a reward for information, a person cannot accept that reward without an awareness of the offer at the time she provides the information.<sup>164</sup> This rule means an enforceable contract for the reward does not form even though an individual gives information, an objective manifestation that looks like acceptance.<sup>165</sup> The result in these cases would be nonsensical if courts could impute knowledge that there may be a reward offered somewhere. Under this principle, unknowing “consent” should not be acceptance of a TOS either.

While the majority of courts continue to suspect that the reasonable consumer should know that terms exist, one commentator recently argued that there are circumstances in which consumers cannot rationally be expected to fathom that they have entered into an agreement by performing certain actions.<sup>166</sup> A prime example of this is the Google TOS that purportedly binds all consumers who merely conduct a Google search. “It seems farcical that the general public would believe that each of those searches would bind a person to a contract,” given that the TOS

---

163. *Hoffman*, 18 A.3d at 210.

164. *Glover v. Jewish War Veterans*, 68 A.2d 233, 234 (D.C. App. 1949) (“[A]t least so far as private rewards are concerned, there can be no contract unless the claimant when giving the desired information knew of the offer of the reward and acted with the intention of accepting such offer.”).

165. See, e.g., *Gasden Times v. Doe*, 345 So. 2d 1361 (Ala. Civ. App. 1977); *Consol. Freightways Corp. v. Williams*, 228 S.E.2d 230 (Ga. App. 1976); *Glover*, 68 A.2d at 234; *Forsythe v. Murnane*, 129 N.W. 134 (Minn. 1911). A minority of states have created exceptions to the general rule that allow individuals to collect a reward without having knowledge at the time information was offered. See, e.g., *Eagle v. Smith*, 9 Del. (1 Houst.) 293 (Del. Super. Ct. 1871).

166. David A. Puckett, *Terms of Service and the Computer Fraud and Abuse Act: A Trap for the Unwary?*, 7 OKLA. J. L. & TECH. 53 (2011).

is not even found on Google's home page.<sup>167</sup> And the author humorously points out, "[o]ne could certainly use Google to search for Google's TOS, but this solution seems to put the cart before the horse."<sup>168</sup>

### B. The Constraining Doctrines

Notwithstanding the quite obvious trend of the cases in the last three years, some scholars and many practitioners have trouble believing that courts are really enforcing material terms in TOS. We want to believe that where doctrines exist, courts must be applying them as balance against the economic might of powerful market players. Specifically, if unconscionability doctrine and requirements of assent are recognized in the Restatement, the U.C.C., old case law, and more law review articles than anyone could ever read, there is a natural tendency to assume that this necessarily means courts are using these safeguards. But apparently they have become obsolete.

This trust is reflected in a 2002 article by Professor Hillman, a prominent legal scholar who then believed courts were doing an adequate job policing these contracts.<sup>169</sup> A decade ago things looked a bit different. Specifically, Hillman asserted that "contract law has responded effectively to the problem[s associated with standard form contracts] by following Karl Llewellyn's conception to enforce bargained-for terms and conscionable boilerplate provisions, *while barring egregious terms*."<sup>170</sup> Consistent with this proposition, Hillman later notes in the same article that "[c]ourts generally find unconscionability either when the bargaining process is deficient or the substantive terms are oppressive, although the strongest and most persuasive cases involve both."<sup>171</sup> Professor Hillman only cites two sources. One source is a 2002 case out of California discussing unconscionability; but it finds the disputed term to be *conscionable*.<sup>172</sup> The other source is not a case, but rather it is his own article from 1981 that makes many of the same assertions that are readdressed in his 2002 article.<sup>173</sup> A decade later, we have found no evidence that courts are regularly throwing out TOS terms

---

167. *Id.* (citing *Google Homepage*, GOOGLE, <http://www.google.com> (last visited Oct. 13, 2010)).

168. *Id.*

169. Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 743 (2002).

170. *Id.* (emphasis added).

171. *Id.* at 749.

172. *Bischoff v. DirectTV, Inc.*, 180 F. Supp. 2d 1097, 1107 (C.D. Cal. 2002) (finding an arbitration clause in a consumer agreement to be enforceable in an unconscionability dispute).

173. Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 *CORNELL L. REV.* 1, 30 (1981) (discussing the purpose and application of unconscionability in contract disputes, generally).



for procedural or substantive unconscionability—or both. In fact, we have found the opposite.<sup>174</sup>

What all of this means is that a practitioner, consumer, or small business owner who has either learned or recently read about possible defenses to formation or enforceability may be surprised to find that these theories are hardly defenses at all in 2012. Courts are not only shying away from finding anything to be unconscionable, they are also finding these online agreements to be presumptively enforceable unless the party can show some kind of highly abnormal conduct.<sup>175</sup> And so long as online service providers continue to uniformly insert overreaching terms in clickwrap agreements, the community conception of “standard” terms begins to conform. A consumer becomes less and less able to argue that anything extreme or abnormal has taken place when an online service provider asserts a unilateral modification, an obscure arbitration clause, or some other painful term she did not anticipate.

## V. CONCLUSION

Contract law is treading a path away from requiring explicit manifestations of assent for contract formation and reasonable boundaries on undickered terms. Online service providers write increasingly powerful terms and insert them in ever-smaller-hyperlinked beasts of elaborate and lengthy TOS and assert that any click, or opening the page, means intent to be bound.

Like Lord Mansfield, Judge Easterbrook resolves cases on policies rather than law.<sup>176</sup> Like Lord Mansfield, he has become something of a pop icon in law and many judges apparently feel compelled to follow him just as scholars are compelled to cite him, even if they disagree.<sup>177</sup> Of course, he is not the only judge with strong economic driven sentiments, but he has become something of a figurehead for the movement that has led us to underestimate the risks of private law.

In another context, Professor O'Melinn dramatically combines three themes: return to feudalism, horses, and Judge Easterbrook.<sup>178</sup> While we

---

174. See *supra* notes 159–61 (citing cases upholding clickwraps).

175. See *supra* note 159 (citing a number of cases where courts recently have accepted as a base-line that clickwrap agreements are enforceable).

176. See *supra* note 10.

177. See *supra* Part II.C (discussing this phenomenon with both Lord Mansfield and Judge Easterbrook).

178. Liam S amus O'Melinn, *Software and Shovels: How the Intellectual Property Revolution is Undermining Traditional Concepts of Property*, 76 U. CIN. L. REV. 143 (2007). This article is a challenge to the purported “war on peer to peer” and the role of Judge Easterbrook’s jurisprudence in designating property rights.

may differ some on the importance of copyright protection and other details, the juxtaposition of these themes is delightfully stated in this short excerpt:

Judge Easterbrook has famously declared that there was no law of the horse . . . and there should likewise be no law of the computer. The irony could not be greater, for there was once an extremely important law of the horse—"feudalism" . . .—and Judge Easterbrook is the most famous of a number of jurists who are fashioning a new law of the horse for the computer age.

Judge Easterbrook cannot be taken at his word. Posturing as the champion of freedom of contract, he blithely imposed an onerous licensing agreement on Matthew Zeidenberg—one to which Zeidenberg had not agreed. . . .

The nobility who stood atop European society in the middle ages were horsemen whose superiority was marked by hardware. . . . The horse soldier had to have stirrups, which afforded him unprecedented control over his mount and made him indispensable to Europe's monarchs. Fighting on horses was an expensive business; horses were themselves costly, they had to be replaced when they were killed, they required large quantities of food, and the armor which the chevalier wore was costly. The result was the development of an exceptional class [over] those who did not have the money to own and equip a horse.<sup>179</sup>

Those with money, ergo market clout, increase their power through the use of "private law." That kind of power needs to be reined in by the interests of others, and this is the duty of government and courts. We are not arguing for increasing government, heaven forbid. We are arguing for courts to remember that established law does not justify the unbridled run of wild adhesion contracts. The thinking that accompanied the acceptance of adhesion contracts included a reasonable corral beyond which they could not stray.

The appropriate corral, broad enough to allow room to roam but with ultimate boundaries, can be readily envisioned from part of the Supreme Court's opinion in *Carnival Cruise v. Shute*<sup>180</sup>—a part that seems to be doomed to obscurity. The Court, at least in lip service, acknowledges that the boundaries are notice and "fundamental fairness."<sup>181</sup> Notice harkens to the procedural prong of unconscionability and fundamental fairness captures the substantive prong.

This "fundamental fairness" balance also resonates in the doctrine of unconscionability and Restatement (Second) of Contracts § 211(3) on Standardized Agreements. The concept of fairness commensurate with

179. *Id.* (citing LYNN WHITE, JR., *MEDIEVAL TECHNOLOGY & SOCIAL CHANGE* 1 38 (1962)).

180. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

181. *Id.* at 595.

reasonable expectations touches on both the notice given of online contracts and the content of terms.

A telling illustration of our thesis is that Judge Easterbrook refers in *ProCD v. Zeidenberg* to § 211 but only the language from Official Comment “a” without reference to the part on restraints on enforcement.<sup>182</sup> Unquestionably this cited language describes the merits of the TOS horse, but Judge Easterbrook wholly ignores the other half of the two-part principle—the corral that was intended to provide boundaries for the horse—as evidenced in § 211(3). Judge Easterbrook does not quote Official Comment f:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation. A debtor who delivers a check to his creditor with the amount blank does not authorize the insertion of an infinite figure.<sup>183</sup>

Further, he does not discuss how the “terms after formation” process fits with this sentence in Comment f: “The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view.” As discussed above, we do not here dispute the result in *ProCD*. Zeidenberg should have realized that he was cheating the system. We do dispute the callous treatment of contract law in the case, particularly given the currency it has received and the breadth with which it is applied.

We conclude with Karl Llewellyn’s ever-thoughtful rumination (and an interesting note on what marriage meant in 1939 before the divorce revolution):

[C]oncept[s] of contracts “of adhesion” . . . turn attention . . . [to the] reality of consent; if one must take or leave [terms] in block, and needs to take, has he “assented”? It is with a sound instinct that many writers have been impelled to answer: Yes. But that merely sets the problem. You take or leave your marriage agreement, pretty much in block; you “adhere,” you do not “bargain.” The point is that when that is the type of choice and the only type of choice really available, *it has been and still is the law’s business, and in a case-law system, the judges’, to see that the block to which you are indeed assenting as a transaction is carved into some approximation of decent balance in its detail.* . . . [A] block of terms which is not individualized to the bargainors . . . needs

---

182. “Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions.” *ProCD v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981)).

183. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) cmt. f (1981).

reestablishment of [a] type of balance . . . .”<sup>184</sup>

Has this concept of “decent balance” been wholly slashed from the law? A reading of current clickwrap and browsewrap terms and cases enforcing them seems to suggest it has.

---

184. Llewellyn, *supra* note 1, at 703 n.7 (the emphasized part was quoted as a preamble to this Article).