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II. CYBERLAW: A. Note: Presumed Assent: The Judicial Acceptance of Clickwrap

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SUMMARY:
 ... Rather than attempting to enter the debate over how theoretically unreasonable these contracts can be, this Note accepts that clickwrap agreements can provide significant benefits and suggests that a review of the cases in which clickwrap terms have been litigated demonstrates that contractors are not vigorously exploiting their ability to extract assent in a way that requires a drastic judicial response. ... Despite these concerns, the courts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998. ... For example, in one recent case, XPEL Technologies Corp. v. Maryland Performance Works Ltd., the court enforced a forum selection clause that was agreed to as part of a clickwrap End User License Agreement (EULA) based on evidence of actual clicking. ... held that the forum selection clause in the clickwrap Terms of Service Agreement for a website was valid and enforceable based on evidence of actual clicking despite the plaintiff's inability to remember clicking "Accept. ... com argued that the forum selection clause was invalid because Shim did not remember clicking "Accept. ... In order to download the software, the user must visit the company's website and provide certain information to get to the download page, which included the terms of the license agreement. ... Accordingly, the court held that because it was impossible to download and install the software without accepting the clickwrap license, the evidence was "sufficient to support the conclusion that Interactive could not have incorporated [the licensed software] in [its] software without clicking "Yes' to the terms of the license agreement. ...

TEXT:
 [*577]

Electronic standard form contracting has become increasingly common as computers and the internet have taken on an important role in commerce and in the distribution of products and services. n1 Despite the prevalence of these types of agreements, they have been the subject of controversy because of the conventional wisdom that people typically do not take the time to read standard form contracts. n2 Rather than attempting to enter the debate over how theoretically unreasonable these contracts can be, this Note accepts that clickwrap agreements can provide significant benefits and suggests that a review of the cases in which clickwrap terms have been litigated demonstrates that contractors are not vigorously exploiting their ability to extract assent in a way that requires a drastic judicial response. This Note submits that although the current analytical framework for adjudicating clickwrap agreements does not include a particularly rigorous assent analysis, it has been adequate for addressing the types of agreements that have been litigated thus far.

This Note will focus exclusively on clickwrap, n3 rather than shrinkwrap n4 or browsewrap agreements. n5 Click-wrap agreements are generally [*578] thought to be a form of adhesion contract. n6 Despite the inherent dangers, n7

such contracts have been recognized as a necessary and beneficial part of a functioning economy. n8 Although click-wrap agreements are often long, complex, and include many terms, most litigation is over one of six basic types of terms: forum selection clauses, choice of law provisions, agreements to arbitrate, software terms of use, service terms of use, or limitations of liability.

These types of terms in particular have been recognized by commentators as providing important economic advantages. Forum selection clauses are "an indispensable element in international commerce, and contracting" n9 and are necessary to provide certainty as to where future disputes will be litigated. n10 Arbitration provisions offer licensors a quick, inexpensive, **[*579]** and flexible alternative to litigation. n11 Software license agreements allow producers to keep prices low by reducing transaction costs n12 and give licensors flexibility to provide inexpensive, but limited rights to some users while charging other users more for rights that come at a higher cost to the developer. n13 Eliminating these benefits could have a significant negative effect on commerce. n14

Although clickwrap agreements provide these benefits, they have also raised concerns about the potential for sneaking onerous terms into agreements. n15 Some of the most controversial terms include those forbidding public criticism of the product, requiring consent to third-party monitoring, prohibiting reverse engineering, prohibiting use in connection with third-party software, requiring consent to future revisions of the agreement (which is subject to change without notice), disclaiming warranties, and disclaiming liabilities. n16

Despite these concerns, the courts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998. n17 Essentially, courts have settled on a mechanical approach to determining whether assent was given by simply testing whether the click can be proved. Over time, courts have made it clear that absent fraud or deception, the user's failure to read, carefully consider, or otherwise recognize the binding effect of clicking "I Agree" will not preclude the court from finding assent to the terms.

However, the courts have shown a willingness to consider other doctrines that can mitigate the harshness of unfair terms and compensate, at least to some degree, for the fact that many users may not truly wish to agree. These doctrines include unconscionability, violations of public policy, **[*580]** analyses of the fairness of forum selection clauses, and federal copyright preemption. These doctrines have provided a workable framework for determining the enforceability of clickwrap agreements because they address the major concerns inherent in the varieties of terms that have ended up in court. This Note argues that these alternative doctrines, rather than a more rigorous assent analysis, provide an acceptable way of adjudicating the enforceability of these terms while allowing the realization of the recognized benefits of standard form contracting in the electronic environment.

I. EARLY HISTORY

Clickwrap licensing first received judicial recognition in ProCD, Inc. v. Zeidenberg n18 in 1996, although the term "clickwrap" was not used until later. This case is famous for its holding that pay-first, terms-later shrinkwrap licensing of software is a valid form of contracting. n19 The license agreement at issue was printed in the user manual, encoded on the CD-ROM disk, and displayed each time the program was started. n20 Although this case is most commonly cited for its application to shrinkwrap licensing, the court noted in its acceptance analysis that Zeidenberg "had no choice [but to accept the license], because the software splashed the license on the screen and would not let him proceed without indicating acceptance." n21 Outside of this one sentence, this decision did not address clickwrap licensing because the court found that Zeidenberg accepted the terms when he used the software, not when he merely clicked to indicate his acceptance in order to navigate past the license screen. n22 After this decision, there was a two-year lull before clickwrap resurfaced in a judicial opinion.

The first case to clearly suggest that clickwrap agreements, standing alone, are enforceable was a preliminary injunction ruling in Hotmail Corp.. v. Van$ Money Pie n23 in April 1998. In Hotmail, the court granted Hotmail's motion for a preliminary injunction based on its likelihood of success on a variety of claims, including, importantly, breach of contract based on a clickwrap license agreement. n24

[*581] The defendant, Van$ Money Pie, was in the business of sending thousands of "spam e-mail messages" advertising products such as pornographic materials and cable descrambling kits. n25 In the course of its business, the defendant created multiple Hotmail accounts for receiving responses and "bounced back" messages. n26 Before opening these accounts, the defendant was required to agree to the clickwrap Terms of Service provided by Hotmail, which included a clause that forbade users from sending unsolicited bulk e-mail and obscene or pornographic materials. n27 Based on this fairly sympathetic set of facts, the court held that the evidence supported a finding that Hotmail would

likely prevail on the breach of contract claim without further discussion of the issues of assent or the enforceability of such online agreements. n28

Within two months of the Hotmail decision, the Rhode Island Superior Court addressed a similar issue and reached the same conclusion in Groff v. America Online, Inc. n29 This time, the court provided a more detailed discussion of its rationale for enforcing the clickwrap agreement, but, as in Hotmail, it did not address the peculiarities of online contracting.

At issue in Groff was a forum selection clause that selected Virginia law and Virginia courts as the appropriate law and forum for litigation between members and AOL. n30 During the installation of AOL's software and the process of subscribing to AOL's online service, the user was presented with the Terms of Service and prompted to select either "I Agree" or "I Disagree." n31 The user was unable to proceed unless and until he clicked "I Agree." n32

Similar to Hotmail, the court did not address the unique nature of online contracting as part of its analysis. Instead, it considered the enforceability of the forum selection clause under the guidance of traditional contract cases that involved such clauses. n33 In examining the circumstances surrounding the contracting, the court noted that the plaintiff, a 30-year member of the Rhode Island bar, should have known that he was accepting **[*582]** a binding contract and failed to give any reason for his alleged failure to see, read, or agree to the terms. n34 The court held that the plaintiff had the option not to accept the terms, but instead "effectively "signed' the agreement by clicking "I Agree' not once but twice" and therefore could not complain that he failed to take note of the terms. n35

Thus, clickwrap was squarely addressed in two cases in 1998 and was immediately found to be enforceable without much discussion, perhaps in part because both cases featured relatively unsympathetic parties - the internet pornography spammer and the veteran lawyer who did not read contracts. In both of these cases, the courts used traditional contract doctrines to determine issues of enforceability without expressing much interest in the peculiarities of clickwrap. Since these two cases were decided, courts have used largely the same analytical process and have enforced the vast majority of clickwrap cases that have come before them. n36 Essentially, the courts determine whether the requisite click occurred, and, if so, presume that the user assented to the terms of the agreement.

There have only been a few occasions when courts have refused to enforce the terms of clickwrap agreements. These cases never turned on the issue of whether a click was sufficient to manifest assent. Instead, these courts either refused to enforce the agreements because there was insufficient evidence of clicking, or voided the terms based on traditional contract doctrines.

II. THE ANALYTICAL PROCESS FOR EVALUATING ASSENT TO CLICKWRAP

In most clickwrap cases, the courts have taken a fairly straightforward approach to analyzing the enforceability of the disputed terms. The court **[*583]** will generally begin by determining whether the user assented to the terms. Although there is some controversy about whether simply clicking "I Agree" should be sufficient to show assent, n37 courts have almost uniformly found assent when the user clicks while having notice of the terms. Next, the court will dispose of any objections based on the failure to read, appreciate, or understand the contract. Finally, the court will give more careful consideration to arguments that the term is unconscionable or a violation of public policy, or, in the case of forum selection clauses, that the term is unfair or unreasonable. These arguments will be addressed further in Part Alternative Doctrines for Testing the Validity of Clickwrap Agreements.

The courts have essentially reduced the assent analysis to a test of whether there is evidence that the user clicked the acceptance icon or proceeded in a manner that would have been impossible but for clicking on the acceptance icon. If the party asserting the term can prove either of these alternatives, the courts will generally find assent without much further discussion.

For example, in one recent case, XPEL Technologies Corp. v. Maryland Performance Works Ltd., n38 the court enforced a forum selection clause that was agreed to as part of a clickwrap End User License Agreement (EULA) based on evidence of actual clicking. n39 The plaintiff operated a website that sold design kits for manufacturing protective coating for automobile paint, headlights, and windows. n40 In order to access the section of the website that sold the kits, each user was required to agree to the EULA, which provided that all disputes would be arbitrated or litigated in Bexar County, Texas. n41 The defendant stated that he was "unaware of ever "clicking on' the EULA," n42 but the court found assent by relying on the plaintiff's evidence that the defendant had in fact accepted the agreement on twenty-nine separate occasions. n43

Similarly, the court in Eslworldwide.com, Inc. v. Interland, Inc. n44 held that the forum selection clause in the clickwrap Terms of Service Agreement for a website was valid and enforceable based on evidence of actual **[*584]** clicking despite the plaintiff's inability to remember clicking "Accept." n45 Eslworldwide.com sued the provider of its web-hosting services, Interland, for damages resulting from the loss of access to its database for seven months. n46 A few days before the database loss, Interland instructed Shim, the president of Eslworlwide.com to go to Interland's website, log in, and enter a valid credit card number to pay late fees. n47 Before he was able to access the webpage to input the credit card information, he was required to "Accept" or "Decline" new Terms of Service by clicking on one of the two buttons. n48 Eslworldwide.com argued that the forum selection clause was invalid because Shim did not remember clicking "Accept." n49 However, the court held that this argument was insufficient to overcome the general presumption that forum selection clauses are valid and enforceable because Interland's records showed that Shim did indeed click "Accept." n50 In some circumstances, the licensor will not have access to specific evidence showing that the user actually clicked "I Accept." In these cases, the courts have accepted evidence that the user's actions would not have been possible without the requisite click. n51

In Recursion Software, Inc. v. Interactive Intelligence, Inc., n52 Recursion Software sued Interactive Intelligence, another software company, for breach of a software license. n53 The record showed that Interactive incorporated the licensed software into its own software in violation of the terms of the click-wrap license agreement, n54 but Interactive argued that there was no evidence that it ever assented to those terms. n55 However, one of **[*585]** Interactive's software developers testified that he had personally downloaded the licensed software and saved it to his computer. n56 In order to download the software, the user must visit the company's website and provide certain information to get to the download page, which included the terms of the license agreement. n57 The software could not be downloaded unless the user responded affirmatively when prompted to click a "Yes" or "No" button to indicate acceptance to the terms. n58 Accordingly, the court held that because it was impossible to download and install the software without accepting the clickwrap license, the evidence was "sufficient to support the conclusion that Interactive could not have incorporated [the licensed software] in [its] software without clicking "Yes' to the terms of the license agreement." n59

Courts have only refused to enforce clickwrap agreements for lack of assent when the party seeking to enforce the term was unable to present evidence that the user either actually clicked or must have clicked on the acceptance icon. This situation has presented itself in three scenarios: (1) the user was not clearly required to affirmatively indicate assent before completing the transaction; (2) the user was never required to assent before the alleged violation; and (3) the user's claim arose before the user had the opportunity to assent.

The first scenario arose in Specht v. Netscape Communications Corp. n60 The plaintiffs sued Netscape alleging that Netscape's SmartDownload software violated the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act. In response, Netscape moved to compel arbitration based on an arbitration clause in the EULA. n61 The plaintiffs downloaded the software from Netscape's website by clicking a button labeled "Download." n62 The webpage only had one reference to the EULA, a message inviting the user to review the license agreement, which only became visible if the user scrolled to the bottom of the page. n63 The court found that this process "allows a user to download and use the software without taking any action that plainly manifests assent to the terms of the associated license or indicates an understanding that a contract is being **[*586]** formed." n64 The court justified this holding by reasoning that the "Download" button, as contrasted with a button labeled "I assent," did not put the user on notice or indicate that he was entering into a binding contract. n65 Therefore, no contract was formed because Netscape "failed to require users of [the software] to indicate assent to its license as a precondition to downloading and using its software." n66 On appeal, the Second Circuit agreed that clicking the "Download" button did not communicate assent because the website did not make it clear that such an action would be interpreted as signifying assent. n67

The second scenario was adjudicated in SoftMan Products Co. v. Adobe Systems Inc. n68 Adobe accused SoftMan of violating the terms of its license agreement by breaking apart collections of Adobe software and copying and distributing the individual parts in an unauthorized manner. n69 Adobe distributed its software according to licenses that were electronically stored and presented to the user for acceptance during the installation process. n70 However, SoftMan never attempted to load any of the software onto its computer, and therefore never encountered the license agreement or had the opportunity to assent to its terms before the alleged copying and distribution. n71 Although the product boxes contained a notice that the software was subject to a license agreement, the court held that simply reading the notice on the box did not provide assent. n72 Rather, the user must accept the license agreement explicitly during installation before he will be bound by the terms. n73

[*587] The third and final situation is similar to the second scenario discussed above, but differs in that in all likelihood the terms would have been agreed to but for the claim arising before the opportunity to assent to the contract.

This circumstance arose in Martin v. Snapple Beverage Corp. n74 when the defendant tried to enforce an arbitration provision that was part of the rules for an online promotional program. n75 The promotion encouraged consumers to save Snapple bottle caps and redeem them for merchandise via Snapple's website, and gave rise to the plaintiff's lawsuit when stock of merchandise ran out, leaving essentially no products available for purchase. n76 Users who attempted to purchase merchandise with their bottle caps were required to click an "I agree" button during the process of placing their order. n77 However, a user could visit the website, browse the merchandise, and collect bottle caps without ever clicking on the "I agree" button and, in fact, Snapple did not present any evidence that any of the plaintiffs actually did so click. n78 The court held that although Snapple's website had an "I agree" button and the plaintiffs may have viewed that page, there was insufficient evidence to find assent to the arbitration clause in the absence of proof that the plaintiffs actually clicked the "I agree" button. n79

These few cases are the only occasions on which courts have refused to enforce clickwrap agreements based on a lack of assent to the terms. Essentially, it has been settled that clicking a button labeled "I Accept" or "I Agree" provides adequate assent and creates a binding agreement. Therefore, courts must only conduct a mechanical analysis of whether the evidence proves that such a click actually occurred prior to the action that allegedly violated the agreement. Although contractees sometimes continue to argue that they should be released from the contract because the terms were too lengthy and cryptic, n80 they did not read the agreement, n81 **[*588]** did not remember clicking "I accept," n82 or did not realize that they were agreeing to anything, n83 the courts are quick to discard these arguments as irrelevant. However, there are other doctrines, such as unconscionability, public policy, analyses of the reasonableness of forum selection clauses, and copyright preemption, which can be used to hedge against the possible unfairness resulting from rubber-stamping the finding of assent. Part Overview of Cases in Which Clickwrap Agreements Have Been Litigated provides an overview of the types of cases in which clickwrap agreements **[*589]** are litigated, and Part Alternative Doctrines for Testing the Validity of Clickwrap Agreements examines how these alternative doctrines can mitigate some concerns about the lack of a rigorous assent analysis.

III. OVERVIEW OF CASES IN WHICH CLICKWRAP AGREEMENTS HAVE BEEN LITIGATED

Currently, there have been approximately fifty-eight cases in which clickwrap agreements have been litigated. An examination of these cases shows that each of the disputed terms can be categorized into one of six categories: forum selection, choice of law, arbitration, breach of software license, breach of service contract, or limitation of liability. Because multiple terms are at issue in some cases, it is most informative to count the number of times each type of provision has been litigated.

The results of this analysis are shown in Figure 1. The most obvious observation is that nearly eighty percent of the litigated terms involve procedural aspects of the lawsuit, namely forum selection clauses, choice of law provisions, and agreements to arbitrate.

[SEE FIGURE 1 IN ORIGINAL]

Figure 1 n84 A second observation is that very few of the most onerous types of terms n85 have resulted in litigation. There has been no litigation pertaining to provisions prohibiting public criticism, requiring acquiescence to monitoring, **[*590]** or prohibiting use with competitors' products. Although there has been litigation over provisions forbidding reverse engineering, that type of provision accounts for only two of the seventy-one disputed clickwrap terms. n86 Finally, limitation of liability provisions account for only five cases, two of which were between business entities, n87 leaving only three cases where consumers were disputing the term. n88 Thus, over the past eight years, only seven clickwrap disputes, or less than ten percent of all such disputes, have involved the most controversial types of provisions.

Based on these two observations, this Note suggests that clickwrap licensing has not been used in a harsh and oppressive manner that would require additional judicial scrutiny of the assent requirement when enforcing these agreements.

IV. ALTERNATIVE DOCTRINES FOR TESTING THE VALIDITY OF CLICKWRAP AGREEMENTS

Each of the six categories of disputed terms, including the more controversial varieties, is subject to alternative legal doctrines that can be used to protect against licensors taking unfair advantage of the fact that licensees may not carefully read and understand the terms of clickwrap agreements. For example, the unconscionability doctrine can be applied to many types of contracts n89 and has been applied generally to test the terms of various clickwrap agreements. n90 Similarly, courts can refuse to enforce any contractual terms that violate public policy. n91

In addition to these general-purpose doctrines, there are specialized doctrines that can be applied to some types of terms that arise frequently in clickwrap litigation. Forum selection clauses in particular are subject to **[*591]** additional judicial scrutiny as to whether the term is "unreasonable under the circumstances" n92 and choice of law provisions are not enforceable if the choice is "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state" in resolving the dispute. n93 Additionally, although there is controversy surrounding the subject since the decision in ProCD, Inc. v. Zeidenberg, courts may be able to offer additional protection against unfair clickwrap terms by finding that the terms are preempted by federal copyright law.

Although these doctrines may not give judges complete discretion to invalidate terms of clickwrap contracts, the distribution and results of previous cases show that this existing framework has the capability to prevent major injustices while allowing the benefits of electronic standard form contracting to be realized.

A. Forum Selection Clauses

As the most frequently litigated term found in clickwrap agreements, the fair enforcement of forum selection clauses is of fundamental importance. It is firmly established that although these terms are presumed valid, n94 they are subject to an additional layer of judicial scrutiny prior to enforcement. The courts have found that the presumption of validity will be overcome by a demonstration that enforcement would be unreasonable under the circumstances, which potentially occurs when:

(1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state. n95

Although the fundamental unfairness argument is often invoked in clickwrap cases involving forum selection clauses, such arguments are most **[*592]** often unsuccessful. n96 However, three exemplary cases in which courts have struck down forum selection clauses based on the fourth prong, violations of public policy, demonstrate that this doctrine can be effective.

In Williams v. America Online, Inc., n97 the court refused to enforce a forum selection clause that specified Virginia as the exclusive forum for all litigation. n98 The plaintiffs sought to represent a class of Massachusetts residents in a suit alleging that the installation of AOL's software damaged their computers. n99 The court held that it was a violation of public policy to require the plaintiffs to travel from Massachusetts to Virginia to pursue relatively small claims against AOL. n100

Similarly, the court in America Online, Inc. v. Superior Court n101 held that the Virginia law governing the plaintiff's class action claims was so inadequate that transferring the suit according to AOL's forum selection clause would be a violation of California's public policy as codified in the California Consumers Legal Remedies Act (CLRA). n102 The court held that enforcing the forum selection clause (along with the accompanying choice of law provision) would deprive the plaintiffs of the CLRA's statutory remedies designed to protect residents from deceptive and unfair business practices. n103 Most notably, Virginia law shortened the statute of limitations, limited damages if the violation was found to be "unintentional," and failed to provide for lawsuits such as the one at issue to proceed as **[*593]** class actions. n104 Moreover, the court held that California's policy in favor of class action remedies was so important that "the unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the [Terms of Service] forum selection clause." n105

Finally, the court in Scarcella v. America Online, Inc. n106 again refused to enforce AOL's forum selection provision on public policy grounds. n107 The plaintiff in this case sued in small claims court, which the court noted was provided to litigants as a low-cost and relatively simple forum available to individuals who were unable to attend court proceedings during the working day. n108 The court held that transferring the suit to Virginia, as required by the forum selection clause, would be a violation of public policy because it would prevent the plaintiff from receiving the benefits of the small claims court proceedings that the legislature specifically had provided to ensure access to justice. n109

B. Arbitration Provisions

Clickwrap arbitration clauses are often analyzed under the doctrine of unconscionability, but much like the allegations of unreasonableness in the forum selection context these arguments are often unsuccessful. n110 However, two recent cases, Comb v. PayPal, Inc. n111 and Aral v. Earthlink, Inc., n112 demonstrate that the unconscionability doctrine is a viable way to prevent enforcement of an arbitration clause.

 [*594] In Comb, the plaintiffs sued PayPal on behalf of a nationwide class for business practices that allegedly violated state and federal law. n113 PayPal moved to compel arbitration based on its clickwrap User Agreement. n114 The court began its analysis by noting that although the Federal Arbitration Act provides for their enforceability, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." n115 Next, the court found that the contract was procedurally unconscionable because the agreement was a contract of adhesion: it was a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." n116 Finally, the court found in its substantive unconscionability inquiry that the following terms were too one-sided: (1) PayPal was allowed self-help remedies such as freezing customer accounts, while the customer's only option was to pursue arbitration; n117 (2) customers were prohibited from consolidating their claims; n118 (3) the agreement called for the parties to bear their pro rata share of the arbitration expenses, despite the fact that no individual plaintiff's claims exceeded $ 310; n119 and (4) Santa Clara, CA was selected as the exclusive jurisdiction for arbitration, even though PayPal served millions of customers across the United States with an average transaction value of $ 55. n120 The court refused to compel arbitration because the combination of these terms served only as a means of shielding PayPal from liability by making it excessively impractical for plaintiffs to seek relief. n121

The court in Aral followed a comparable analytical process and held that the arbitration provision in Earthlink's DSL service agreement was unconscionable and unenforceable. n122 The plaintiff, a California resident, brought a class action suit against Earthlink for overcharging customers for internet access. n123 The arbitration provision required that all claims be settled by arbitration in Georgia. n124 The court focused its attention on the **[*595]** plaintiff's inability to seek class action relief which it recognized may be "the only effective way to halt [and] redress the exploitation when [a] company wrongfully exacts a dollar from each of millions of customers." n125 Accordingly, the provision was unconscionable under California law given the allegation that "numerous consumers were cheated out of small sums of money through deliberate misbehavior." n126

C. Software Usage Agreements

 Copyright preemption has recently been raised unsuccessfully as a defense to claims alleging violations of clickwrap software license agreements. Although the defense has been unsuccessful, courts have not entirely discounted the applicability of the doctrine and commentators continue to suggest that the courts have been misguided in refusing to consider preemption arguments more carefully. n127 It is addressed here because the state of the law may not yet be settled n128 and preemption may emerge as a viable defense to breach of software license claims.

A state-law contract claim, such as one arising out of a clickwrap agreement, is preempted by federal copyright law if: "first, the [contractually-governed] work [is] within the scope of the subject-matter of copyright as specified in *17 U.S.C. ßß102,* 103, and second, the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in *17 U.S.C. ß106.*" n129 The second prong has caused difficulties for defendants in electronic contracting cases because courts have continued to find that contractual rights are not "equivalent" to copyrights. n130 Copyright preemption arguments have been raised, and rejected, **[*596]** in the two most recent clickwrap cases involving breach of software license claims.

In the first case, Davidson & Associates, Inc. v. Internet Gateway, n131 the plaintiff alleged that the defendants violated the clickwrap EULA by reverse engineering the plaintiff's software to learn the underlying protocol and to develop their own alternative software. n132 In response, the defendants urged that the Copyright Act preempted the plaintiff's breach of EULA claim. n133 The court recognized that the software was within the subject matter of copyright, but found that the second prong of the test failed because the "right to restrict the use" that was created by the EULA was not equivalent to any right provided by the Copyright Act. n134 However, it is precisely this type of restriction on reverse engineering that leads commentators to doubt the validity of some courts' preemption analyses. The existence of seemingly contradictory case law suggests that the application of this defense is still unsettled and may become viable in the future. n135

In the second recent case, Recursion Software, Inc. v. Interactive Intelligence, Inc., n136 the court held that federal copyright law did not preempt enforcement of a clickwrap license agreement term prohibiting the licensee from embed-

ding the licensed software within software that is marketed or sold. n137 The defendant allegedly violated this term by selling its software to the public after incorporating plaintiff's software. n138 The defendant characterized the plaintiff's claim as being "based solely on the distribution" of the licensed software and accordingly argued that the Copyright **[*597]** Act should preempt it. n139 However, the court found that the alleged infringing act was more properly characterized as the defendant's conduct of embedding the plaintiff's software into its own product that was sold because the license otherwise allowed for distribution of the plaintiff's software. n140 Therefore, the court held that the claim was not preempted because it was not "equivalent" to the distribution rights afforded by copyright law. n141 However, the court criticized and declined to adopt the expansive rule used by some courts that "breach of contract claims can never be preempted by copyright because they necessarily involve the additional element of a promise to perform the contract." n142 Thus, although the defendant's argument failed in this case, the court left open the possibility of future defendants prevailing on copyright preemption grounds.

D. Unconscionability, Public Policy, and the Remaining Litigated Terms

Finally, unconscionability and public policy doctrines have been applied to the remaining terms that have been litigated but are not discussed in previous sections. The fact-specific analyses in the few cases involving these terms make it difficult to come to a definite conclusion as to how each of these clauses will be treated in the future, but the courts have shown that they are cognizant of the applicability of these doctrines to terms governing software usage, n143 service usage, n144 and limitations of liability. n145 **[*598]** Although these defenses were not successful in the cited cases, the inclusion of these doctrines in the courts' analyses suggests that they will be available in the future if unreasonable terms are litigated. Because these terms rarely arise in litigation and the courts have shown that they are aware and presumably capable of applying these doctrines if necessary, there is nothing to suggest at this time that unreasonable terms cannot be adequately addressed within the current framework.

V. CONCLUSION

Despite the controversial nature of clickwrap agreements, courts have settled on a mechanical assent analysis that only seeks to determine whether or not the "I Agree" button was indeed clicked. Although there are legitimate reasons for believing that computer users do not truly agree when clicking through electronic license agreements, invalidating all of these terms for lack of assent would have significant negative effects on electronic commerce. A review of the occasions on which these agreements have been litigated shows that these agreements do not tend to result in the enforcement of particularly onerous terms. Rather, the majority of cases involve terms such as forum selection and agreements to arbitrate, which, when reasonable, are generally thought to provide economic benefits to both consumers and providers. Each term that has been litigated is susceptible to review under various legal doctrines: there is a specialized forum selection clause analysis, and all of the other terms are subject to review pursuant to unconscionability and public policy doctrines. Courts have in the past and can continue to invalidate clickwrap agreement terms on each of these grounds. When the types of terms that have been litigated are viewed in conjunction with the courts' demonstrated ability to void unfair terms, the current framework for adjudicating clickwrap licensing appears to be an effective way to allow the benefits of these contracts to accrue without posing a serious threat to contractees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCensorshipObscenity & Indecent SpeechComputer & Internet LawInternet BusinessContractsElectronic ContractsCopyright LawConveyancesLicensesBrowsewrap & Clickwrap

FOOTNOTES:

n1. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, Standard-Form Contracting in the Electronic Age, *77 N.Y.U. L. Rev. 429 (2002).*

n2. See Juliet M. Moringiello, Signals, Assent and Internet Contracting, *57 Rutgers L. Rev. 1307 n.30 (2005)* (noting that despite a lack of empirical research, many commentators state that many people do not read standard forms); Lydia Pallas Loren, Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse, *30 Ohio N.U. L. Rev. 495, 503 (2004)* ("It is common knowledge

that the vast majority of individuals do not, in fact, read the shrinkwrap and clickwrap agreements employed by content owners.").

n3. A clickwrap agreement has been defined as:

[An] agreement [that] appears when a user first installs computer software obtained from an online source or attempts to conduct an Internet transaction involving the agreement, and purports to condition further access to the software or transaction on the user's consent to certain conditions there specified; the user "consents" to these conditions by "clicking" on a dialog box on the screen, which then proceeds with the remainder of the software installation or Internet transaction.

Kevin W. Grierson, Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions, *106 A.L.R.5th 309, 317 n.1 (2003)*.

n4. See Grierson, supra note 3, at 317 n.2 ("A "shrinkwrap' agreement consists of written conditions on a card or paper sheet which appears when the user opens packaged hardware or software, which card or sheet purports to condition use of the hardware or software on the user's implicit agreement to abide by the conditions specified thereon.").

n5. See Christina L. Kunz et al., Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements, *59 Bus. Law. 279, 280 (2003)* (defining browsewrap as "terms and conditions, posted on a Web site or accessible on the screen to the user of a CD-ROM, that do not require the user to expressly manifest assent, such as by clicking "yes' or "I agree."").

n6. See 1 E. Allan Farnsworth, Farnsworth on Contracts ß4.26 (2d ed. 2001) (defining a contract of adhesion as one that is offered on "a take-it-or-leave-it proposition, ... under which the only alternative to complete adherence is outright rejection."); see also Robert W. Gomulkiewicz & Mary L. Williamson, A Brief Defense of Mass Market Software License Agreements, *22 Rutgers Computer & Tech. L.J. 335, 343 (1996)* ("EULAs are most likely "contracts of adhesion'").

n7. 1 Farnsworth, supra note 6, ß4.26 (noting that an adhesion contract "affords a means by which one party may impose terms on another unwitting or even unwilling party.").

n8. 1 Arthur L. Corbin, Corbin on Contracts ß1.4 (Joseph M. Perillo ed., rev. ed. 2006); see also *Restatement (Second) of Contracts ß211* cmt. a (1981) (noting that standardized adhesion contracts reduce transactional and operation costs "to the advantage of all concerned."); W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, *84 Harv. L. Rev. 529, 529 (1971)* (suggesting that standard form contracts account for more than ninety-nine percent of all contracts made).

n9. *M/S Bremen v. Zapata Off-Shore Co, 407 U.S. 1, 13-14 (1972)*.

n10. See, e.g., *Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1015 (D.C. Cir. 2002)* ("Forum selection clauses enhance contractual and economic predictability, while conserving judicial resources and benefiting commercial entities as well as consumers."); *Am. Online v. Superior Court, 90 Cal. App. 4th 1, 12 (2001)* ("There are strong economic arguments in support of [forum selection] agreements, favoring both merchants and consumers, including reduction in the costs of goods and services and the stimulation of e-commerce."); see also Kaustuv M. Das, Comment, Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the "Reasonably Communicated" Test, *77 Wash. L. Rev. 481, 504-06* (summarizing policy reasons for enforcing forum selection clauses).

n11. 2 Michael Scott, Scott on Computer Law ß7.47 (2002). The "emphatic federal policy in favor of arbitral dispute resolution" led to codification in the Federal Arbitration Act, *9 U.S.C. ßß1*-16 (2000). *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 729 (1996).*

n12. Gomulkiewicz & Williamson, supra note 6, at 342.

n13. Id. at 356-57 (noting that most users do not wish to pay the higher cost associated with the right to reverse engineer the software).

n14. See Robert W. Gomulkiewicz, The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing, *13 Berkeley Tech. L.J. 891, 896-97 (1998).*

n15. Annalee Newitz, Dangerous Terms: A User's Guide to EULAs, http://www.eff.org/wp/eula.php (last visited Oct. 23, 2006).

n16. Id.

n17. Hotmail Corp. v. Van$ *Money Pie, Inc., No. C-98 JW PVT ENE, C 98-20064 JW, 1998* WL 388389 (N.D. Cal. Apr. 16, 1998).

n18. *ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).*

n19. *Id. at 1452;* see also *U.C.C. ß2-204(1)* (2003).

n20. *ProCD, 86 F.3d at 1450.*

n21. *Id. at 1452.*

n22. Id.

n23. Hotmail Corp. v. Van$ *Money Pie, Inc., No. C-98 JW PVT ENE, C 98-20064 JW, 1998* WL 388389 (N.D. Cal. Apr. 16, 1998).

n24. Id. at 6.

n25. Id. at 2-3.

n26. Id. at 2.

n27. Id.

n28. Id. at 6.

n29. *Groff v. Am. Online, Inc., No. PC 97-0331, 1998 WL 307001* (R.I. Super. Ct. May 27, 1998).

n30. Id. at 2.

n31. Id. at 1.

n32. Id.

n33. Id. at 3-4 (analyzing the forum selection clause under *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)* and *D'Antuono v. CCH Computax Sys., Inc., 570 F. Supp. 708 (D.R.I. 1983)).*

n34. Id. at 5.

n35. Id.

n36. See, e.g., *Forrest v. Verizon Commc'n, Inc., 805 A.2d 1007 (D.C. Cir. 2002); Siebert v. Amateur Athletic Union of the U.S., Inc., 422 F. Supp. 2d 1033 (D. Minn. 2006);* Salco Distribs., L.L.C. v. Icode, Inc., No. 8:05 CV 642 T 27T*GW, 2006 WL 449156* (M.D. Fla. Feb. 22, 2006); Hugger-Mugger, L.L.C. v. NetSuite, Inc., No. 2:04-*CV-592TC, 2005 WL 2206128* (D. Utah Sept. 12, 2005); *Motise v. Am. Online, Inc., 346 F. Supp. 2d 563 (S.D.N.Y. 2004); Koresko v. RealNetworks, Inc., 291 F. Supp. 2d 1157 (E.D. Cal. 2003);* DeJohn v. The *.TV Corp. Int'l, 245 F. Supp. 2d 913 (N.D. Ill. 2003); Hughes v. McMenamon, 204 F. Supp. 2d 178 (D. Mass. 2002); I.Lan Sys., Inc. v. NetScout Serv. Level Corp., 183 F. Supp. 2d 328 (D. Mass. 2002); Am. Online, Inc. v. Booker, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001); Hopkins v. Trans Union, L.L.C., No. 03-5433 ADM/RLE, 2004 WL 1854191* (D. Minn. Aug. 19, 2004); *Caspi v. Microsoft Network, 732 A.2d 528 (N.J. Super. Ct. 1999); Barnett v. Network Solutions, Inc., 38 S.W.3d 200 (Tex. App. 2001).*

n37. See, e.g., Moringiello, supra note 2, at 1330-33 (questioning whether clicking is comparable to more traditional ways of showing assent).

n38. *XPEL Techs. Corp. v. Md. Performance Works Ltd., No. SA-05-CA-0593-XR, 2006 WL 1851703* (W.D. Tex. May 19, 2006).

n39. Id. at 7-8.

n40. Id. at 1.

n41. Id.

n42. Id. at 7.

n43. Id. at 2.

n44. *Eslworldwide.com, Inc. v. Interland, Inc., No. 06 CV 2503 (LBS), 2006 WL 1716881* (S.D.N.Y. June 21, 2006).

n45. Id. at 2-3.

n46. Id. at 1.

n47. Id.

n48. Id.

n49. Id. at 2.

n50. Id. at 4.

n51. See, e.g., *Eslworldwide.com, Inc. v. Interland, Inc., No. 06 CV 2503 (LBS), 2006 WL 1716881, at 2* (S.D.N.Y. June 21, 2006) (noting that the plaintiff could not have accessed the website without clicking to show assent); Salco Distribs., LLC v. Icode, Inc., No. 8:05 CV 642 T 27T*GW, 2006 WL 449156 at 1* (M.D. Fla. Feb. 22, 2006) (noting that plaintiff was required to click "I accept" before proceeding with installation and registration of software); *Caspi v. Microsoft Network, 732 A.2d 528, 530 (N.J. Super. Ct. 1999)* (noting that plaintiff could not subscribe to MSN without clicking "I Agree"); *Groff v. Am. Online, Inc., No. PC 97-0331, 1998 WL 307001, at 1* (R.I. Super. Ct. May 27, 1998) (noting that user could not become a member of AOL without clicking "I Agree").

n52. *Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F. Supp. 2d 756 (N.D. Tex. 2006),* reh'g denied, Mar. 13, 2006.

n53. *Id. at 761-62.*

n54. *Id. at 783.*

n55. *Id. at 783.*

n56. Id.

n57. Id.

n58. Id.

n59. Id.

n60. *Specht v. Netscape Commc'ns Corp., 150 F. Supp. 2d 585 (S.D.N.Y. 2001),* aff'd, *306 F.3d 17 (2d Cir. 2002).*

n61. *Id. at 587.*

n62. *Id. at 588.*

n63. Id.

n64. *.Id. at 595.*

n65. *Id. at 595-96.*

n66. *Id. at 595.*

n67. *Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29 (2d Cir. 2002);* see also *Williams v. Am. Online, Inc., No. 00-0962, 2001 Mass. Super. LEXIS 11* (Super. Ct. Mass. Feb. 8, 2001) (holding that plaintiffs did not have notice of a forum selection clause in the Terms of Service for a new version of AOL software, despite having previously agreed to a similar term for an older version of software, because the alleged harm occurred before the terms were presented and the plaintiffs cancelled installation without accepting the terms).

n68. *SoftMan Prods. Co. v. Adobe Sys. Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001);* see also *Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 550 (2005)* (questioning whether the user assented to clickwrap terms during installation based on the user's uncontested declaration that he used "alternate means known to him as a software engineer" to install the software without clicking to indicate acceptance).

n69. *SoftMan, 171 F. Supp. 2d at 1080.*

n70. Id.

n71. *Id. at 1087-88.*

n72. *Id. at 1087.*

n73. Id.

n74. *Martin v. Snapple Beverage Corp., No. B174847, 2005 WL 1580398* (Cal. Ct. App. July 27, 2005).

n75. Id. at 1.

n76. Id.

n77. Id.

n78. Id. at 5.

n79. Id.; see also *Williams v. Am. Online, Inc., No. 00-0962, 2001 Mass. Super. LEXIS 11* (Super. Ct. Mass. Feb. 8, 2001). In Williams, the court focused on the lack of notice in declining to find assent. It seems that it would have been equally valid to find a lack of assent based simply on the plaintiffs' failure to click to show agreement.

n80. See, e.g., *Bar-Ayal v. Time Warner Cable, Inc., No. 03 CV 9905 (KMW), 2006 WL 2990032, at 11* (S.D.N.Y. Oct. 16, 2006) ("That an individual must go through multiple computer screens to read an agreement does not in and of itself mean that he should not be bound by his consent to the agreement as manifested by his clicking of the "accept' button."); *Scarcella v. Am. Online, Inc., 798 N.Y.S.2d 348, 2004 WL 2093429, at 2* (N.Y. City Civ. Ct. Sept. 8, 2004).

The Court does not doubt that the long series of screens with which Claimant was presented did, in fact, induce the trance of lethargy and inattentiveness that he describes, and would have the same effect on many others. A contract of equivalent length printed on paper, however, could be expected to induce the same result. Nonetheless, a signatory to [a] contract ... is presumed to know the contents of the instrument she signed and to have assented to such terms.

 Id. (internal quotations omitted).

n81. See, e.g., *Siebert v. Amateur Athletic Union of the U.S., Inc., 422 F. Supp. 2d 1033, 1039 (D. Minn. 2006)* ("The court finds [the plaintiff's assent to the arbitration provision] was valid, whether or not he had actually read the arbitration and forum selection clauses. Absent fraud or misrepresentation, a person who signs a contract may not avoid it on the ground that he did not read it or thought its terms to be different." (internal quotations omitted)); DeJohn v. The *.TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003)* ("The fact that DeJohn claims that he did not read the contract is irrelevant because absent fraud, ... failure to read a contract is not a get out of jail free card."); *Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 204 (Tex. App. 2001)* ("It was Barnett's responsibility to read the electronically-presented contract, and he cannot complain if he did not do so."). There is one exception to this rule, at least in California: failure to read the terms does qualify as an excuse if the writing does not appear to be a contract and the terms are not called to the attention of the recipient. See *Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 (2d Cir. 2002).*

n82. See, e.g., Eslworldwide.com, Inc. v. Interland, Inc., No. 06 CV 2503(LBS), *2006 WL 1716881, at 4* (S.D.N.Y. June 21, 2006) (holding that plaintiff failed to overcome presumption of enforceability of forum selection because although he "may not remember clicking the icon, ... Defendant's records reveal that he did, in fact, so click."); Hugger-Mugger, LLC v. NetSuite, Inc., No. 2:04-*CV-592TC, 2005 WL 2206128, at 6* (D. Utah Sept. 12, 2005) ("[The plaintiff] testified at the hearing and denied that he clicked on the button. [His] memory of events, although he was a credible witness, simply does not stand up to reliable computer documentation of transactions.").

n83. See, e.g., I-Systems, Inc. v. Softwares, Inc., No. Civ. 02-1951 JRTFLN, 2004 WL 742082, at 6-7 (D. Minn. Mar. 29, 2004) (holding that a jury could find that the defendant accepted the clickwrap license despite the defendant's contention that it was "not aware of and never accepted" the license); *Groff v. Am. Online, Inc., No. PC 97-0331, 1998 WL 307001, at 2* (R.I. Super. Ct. May 27, 1998) (rejecting plaintiff's argument that he never "knowingly agreed to be bound by the choice of law" provision in a clickwrap agreement he accepted by clicking).

n84. Data on file with author.

n85. See Newitz, supra note 15 and accompanying text.

n86. See *Davidson & Assocs., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164 (E.D. Mo. 2004);* I-Systems, Inc. v. Softwares, Inc., No. Civ. 02-1951 JRTFLN, 2004 WL 742082, at 4 (D. Minn. Mar. 29, 2004).

n87. See Treiber & Straub, Inc. v. United Parcel Serv., Inc., No. 04-*C-0069, 2005 WL 2108081, at 3-4* (E.D. Wis. Aug. 31, 2005); *I.Lan Sys., Inc. v. NetScout Serv. Level Corp., 183 F. Supp. 2d 328 (D. Mass. 2002).*

n88. See *In re Am. Online, Inc., 168 F. Supp. 2d 1359 (S.D. Fla. 2001); Moore v. Microsoft Corp., 293 A.D.2d 587 (2002); Mathias v. Am. Online, Inc., No. 79427, 2002 WL 377159, at 2-4* (Ohio Ct. App. Feb. 28, 2002).

n89. See 1 Farnsworth, supra note 6, ß4.28.

n90. See, e.g., *Bar-Ayal v. Time Warner Cable, Inc., No. 03 CV 9905 (KMW), 2006 WL 2990032, at 16* (S.D.N.Y. Oct. 16, 2006); *Davidson & Assocs., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1179 (E.D. Mo. 2004);* DeJohn v. The *.TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003); Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1172-77 (N.D. Cal. 2002); Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 557 (2005).*

n91. See 2 Farnsworth, supra note 6, ß5.1.

n92. *XPEL Techs. Corp. v. Md. Performance Works Ltd., No. SA-05-CA-0593-XR, 2006 WL 1851703, at 6* (W.D. Tex. May 19, 2006) (quoting *Haynsworth v. Corp., 121 F.3d 956, 963 (5th Cir. 1995)).*

n93. *Restatement (Second) of Conflict of Laws ß187(2)(b)* (1971).

n94. See, e.g., *Eslworldwide.com, Inc. v. Interland, Inc., No. 06 CV 2503 (LBS), 2006 WL 1716881, at 2* (S.D.N.Y. June 21, 2006) ("Forum selection clauses are presumed valid and enforceable.").

n95. *XPEL Techs., 2006 WL 1851703, at 6* (internal quotation omitted).

n96. See, e.g., id. (enforcing the forum selection clause because the party seeking enforcement would be equally inconvenienced by a failure to enforce it); *Siebert v. Amateur Athletic Union of the U.S., Inc., 422 F. Supp. 2d 1033, 1046 (D. Minn. 2006)* (holding that Florida was not too remote of a forum to require Minnesotan residing in Minnesota to bring his claim there); *Groff v. Am. Online, Inc., No. PC 97-0331, 1998 WL 307001* (R.I. Super. Ct. May 27, 1998) (holding that the forum selection clause was reasonable under the circumstances).

n97. *Williams v. Am. Online, Inc., No. 00-0962, 2001 Mass. Super. LEXIS 11* (Super. Ct. Mass. Feb. 8, 2001).

n98. Id. at 1.

n99. Id.

n100. Id. at 10 n.4 (noting that one plaintiff's damages amounted to only $ 130); see also *Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 561 (2005)* ("To expect [California consumers with losses between $ 40 and $ 50] to travel to Georgia in order to obtain redress on a case-by-case basis, whether in a courthouse or in an arbitration hearing room, is unreasonable as a matter of law."); *Am. Online, Inc. v. Pasieka, 870 So.2d 170 (Fla. Dist. Ct. App. 2004)* (holding that a forum selection clause requiring litigation in Virginia was unenforceable because it would prevent plaintiffs with small monetary claims from getting relief under the Florida Deceptive and Unfair Trade Practices Act).

n101. *Am. Online, Inc. v. Superior Court, 90 Cal. App. 4th 1 (2001).*

n102. *Id. at 4-5.*

n103. *Id. at 11, 15.*

n104. *Id. at 16-17.*

n105. *Id. at 18;* see also *Dix v. ICT Group, Inc., 106 P.3d 841, 845 (Wash. Ct. App. 2005)* ("Requiring [plaintiffs] to litigate their [Consumer Protection Act (CPA)] claim in Virginia without the benefit of a class action procedure as is allowed in Washington therefore undermines the very purpose of the CPA, which is to offer broad protection to the citizens of Washington. The forum selection clause is unenforceable.").

n106. *Scarcella v. Am. Online, Inc., 798 N.Y.S.2d 348, 2004 WL 2093429* (N.Y. City Civ. Ct. Sept. 8, 2004).

n107. Id. at 3.

n108. Id.

n109. Id.

n110. See, e.g., *Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1013 (D.C. Cir. 2002)* (finding no merit in unconscionability argument); *Siebert v. Amateur Athletic Union of the U.S., Inc., 422 F. Supp. 2d 1033 (D. Minn. 2006)* (holding that an arbitration provision was not unconscionable); DeJohn v. The *.TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003)* (holding that a forum selection clause was not procedurally or substantively unconscionable).

n111. *Comb v. PayPal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002).*

n112. *Aral v. Earthlink, Inc., 134 Cal. App. 4th 544 (2005).*

n113. *Comb, 218 F. Supp. 2d at 1166.*

n114. *Id. at 1166, 1169.*

n115. *Id. at 1170.*

n116. *Id. at 1172.*

n117. *Id. at 1174.*

n118. *Id. at 1175.*

n119. *Id. at 1176.*

n120. *Id. at 1177.*

n121. *Id. at 1176-77.*

n122. *Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 548-49 (Cal. Ct. App. 2005).*

n123. *Id. at 550.*

n124. *Id. at 549.*

n125. *Id. at 556* (internal quotations omitted).

n126. *Id. at 557.*

n127. See, e.g., 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright ß1.01* (2006); David Nimmer, Elliot Brown & Gary N. Frischling, The Metamorphosis of Contract into Expand, *87 Calif. L. Rev. 17, 23 (1999)* (arguing that the decision in ProCD "failed to appreciate the preemptive force of copyright").

n128. See 1 *Nimmer, supra note 127, ß1.01* (suggesting that the Federal Circuit's decision in *Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178 (Fed. Cir. 2004),* cert. denied, *544 U.S. 923 (2005),* casts doubt on the majority decision in *Bowers v. Baystate Techs., Inc., 320 F.3d 1317, 1324 (Fed. Cir. 2003),* cert. denied, *539 U.S. 928 (2003)).*

n129. *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala., 104 F.3d 1453, 1463 (4th Cir. 1997)* (internal quotations omitted).

n130. See, e.g., *Bowers v. Baystate Techs., Inc., 320 F.3d 1317, 1324 (Fed. Cir. 2003),* cert. denied, *539 U.S. 928 (2003)* ("Most courts to examine [Copyright Act preemption] have found that the Copyright Act does not preempt contractual constraints on copyrighted articles."); *ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996)* ("[A] simple two-party contract is not equivalent to any of the exclusive rights within the general scope of copyright and therefore may be enforced." (internal quotation omitted)).

n131. *Davidson & Assocs., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164 (E.D. Mo. 2004).*

n132. Id.

n133. *Id. at 1174.*

n134. *Id. at 1175.*

n135. See 1 *Nimmer, supra note 127, ß1.01*; see also *Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004)* (rejecting the plaintiff's attempt to "repeal the fair use doctrine with respect to an individual selected work" through "a combination of contractual terms and technological measures"). But see *Davidson & Assocs. v. Jung, 422 F.3d 630, 639 (8th Cir. 2005)* ("Private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act." (internal quotations omitted)).

n136. *Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F. Supp. 2d 756 (N.D. Tex. 2006),* reh'g denied, Mar. 13, 2006.

n137. *Id. at 765-66.*

n138. *Id. at 762.*

n139. *Id. at 766.*

n140. Id.

n141. Id.

n142. *Id. at 767* (noting as examples *Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 457 (6th Cir. 2001); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996); Architectronics, Inc. v. Control Sys., Inc., 935 F. Supp. 425, 438 (S.D.N.Y. 1996);* and *Kabehie v. Zoland, 102 Cal. App. 4th 513, 525 (2002)).* In rejecting this rule, the court asked:

Can, for example, a breach of contract claim arising out of a bare promise not to reproduce or distribute copies of a copyrighted work be said to be qualitatively different from a copyright infringement action for the violation of exclusive rights of reproduction and distribution granted to the copyright holder by *17 U.S.C. ß106?*

 Id. at 767-68.

n143. See *Davidson & Assocs., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1179-80 (E.D. Mo. 2004)* (considering and rejecting unconscionability argument).

n144. See DeJohn v. The *.TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003)* (considering and rejecting unconscionability argument); *Siedle v. Nat'l Ass'n of Sec. Dealers, Inc., 248 F. Supp. 2d 1140, 1145 (M.D. Fla. 2002)* (considering and rejecting public policy argument).

n145. See Treiber & Straub, Inc. v. United Parcel Serv., Inc., No. 04-*C-0069, 2005 WL 2108081, at 11-12* (E.D. Wis. Aug. 31, 2005) (noting plaintiff's argument that enforcing the provision would violate public policy, but declining to take jurisdiction over the state law breach of contract claim); *I.Lan Sys., Inc. v. NetScout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass. 2002)* (recognizing that adhesive contracts are susceptible to unconscionable provisions, but finding no such provision in the contested agreement).