

FINDING COMMON GROUND IN THE WORLD OF ELECTRONIC CONTRACTS: THE CONSISTENCY OF LEGAL REASONING IN CLICKWRAP CASES

ROBERT LEE DICKENS*

INTRODUCTION	381
I. THE VALIDITY OF ELECTRONIC TRANSACTIONS AND THE REMAINING QUESTION OF ASSENT IN CLICKWRAP	383
A. <i>UETA and the Enforceability of Electronic Documents</i>	383
B. <i>The Impersonal Nature of Clickwrap: A “Meeting of the Minds” in the Absence of Communication</i>	384
II. MUTUAL ASSENT IN CLICKWRAP: THE REQUIREMENT OF NOTICE AND THE RIGHT TO REVIEW AND REJECT.....	385
A. <i>The Validity of Online Clickwrap: Determining Conspicuous Notice and the Ability to Reject</i>	385
1. Constructive Notice in Online Clickwrap.....	385
2. Requiring the Buyer to Click “I Agree”: Distinguishing Clickwrap from Browsewrap	386
3. Deep Linking into Web Sites: The Ability to Bypass Terms Vacates a Finding of Assent.....	387
4. The Necessary Opportunity to Reject: Invalidating “Assent Now, Terms Later” Contracts.....	389
5. Confirming the Validity of Online Clickwrap.....	390
B. <i>The Enforceability of CD Clickwrap: Notice on the Outside, Terms on the Inside, and a Right to Return</i>	392
1. Required Notice of Subsequent Terms and an Ability to Reject by Return	392

* Contracts Manager, The University of Texas at San Antonio (UTSA); M.A. in Legal Studies 2006, Texas State University; B.A. in Political Science 1991, UTSA; Certified Professional Public Buyer, National Institute of Governmental Purchasing; Certified Texas Purchasing Manager, Texas Building and Procurement Commission. I owe special thanks to my wife and best friend, Susan, as well as my two daughters, Jordan and Kasey, for their support and understanding in publishing this Article. I would also like to thank Professors Lynn Crossett and Walter Wright as well as the rest of the Legal Studies staff at Texas State University for their guidance, encouragement, and enthusiasm on this project.

2. Unambiguous Assent: Establishing Proper Notice of Subsequent Terms	394
3. The Insufficiency of Notice Without the Ability to Reject and Return	396
4. Reconciling Disparity in CD Clickwrap	398
5. Clarifying Notice of Subsequent Terms and the Proper Period of Review	399
a. <i>Clarity of Notice</i>	399
b. <i>Determining a Reasonable Length of Review</i>	400
6. The Ability to Reject and Freedom to Contract	400
III. CLICKWRAP AS A CONTRACT OF ADHESION: THE BENEFIT OF A STANDARDIZED CONTRACT VERSUS UNCONSCIONABLE TERMS	401
A. <i>Defining Clickwrap as an Adhesion Contract: Standardized Terms, No Negotiation, and Unequal Bargaining Power</i>	401
B. <i>Validating Standardized Contracts: The Requirement of a “Reasonable Expectation” of Negotiation</i>	401
C. <i>The Practical Benefit of Standardized Contracts</i>	402
D. <i>Judicial Scrutiny and the Protection of Competition from Holdings of Unconscionable Terms</i>	403
E. <i>Establishing Unconscionable Terms in the Absence of Competition</i>	404
1. The Requirement to Prove Both Procedural and Substantive Unconscionability	404
2. Demonstrating Substantive Unconscionability	405
F. <i>The Lesson in Applying the Unconscionable Doctrine: Clickwrap Plays by the Same Rules as Any Other Contract</i>	406
IV. PRIOR WRITTEN AGREEMENTS: DOES THEIR EXISTENCE AUTOMATICALLY INVALIDATE A SUBSEQUENT CLICKWRAP CONTRACT?	407
A. <i>General Rules and the UCC: Determining Final Intent of the Parties Is a Question of Fact</i>	407
B. <i>The Importance of Explicit Terms</i>	408
1. Trumping Clickwrap with Unambiguous Agreements and Integration Clauses	408
2. Upholding Clickwrap: Filling the Void Left by Ambiguous Terms and a Prior Course of Conduct	409
C. <i>Notes of Caution While Reinforcing the Validity of Clickwrap</i>	411
CONCLUSION	411

INTRODUCTION

With the technological advancements in global communications, contractual arrangements created by electronic transactions are becoming more commonplace. Electronic contractual arrangements have, however, raised complex legal issues unprecedented in the law. Courts must now confront worldwide access to agreements via Web pages, e-mails, and CD-ROMs, and legal doctrines must be consistently tested and reapplied to address the new forms of contracting stimulated by advancing technology.

Technology's impact on traditional contract law doctrine is readily apparent in the dilemmas generated by recent developments in computer software, hardware, and Internet transactions. In such transactions, sellers have increasingly begun utilizing clickwrap agreements, whereby standard terms and conditions are displayed on the computer screen when the user attempts to access the seller's services. In a clickwrap agreement, the seller's terms typically pop up before a purchased software disc can be installed (CD clickwrap) or while a service is being requested on the Internet.¹ The term "clickwrap" evolved from the use of "shrinkwrap" agreements, which are agreements wrapped in shrinkwrap cellophane within computer software packaging, and that, by their terms, become effective following the expiration of a predefined return period for the software (typically thirty days).² Because of such evolution, as well as the many similarities between shrinkwrap and clickwrap, courts addressing the enforceability of clickwrap agreements have relied upon the case law surrounding shrinkwrap cases in formulating their decisions.³ Accordingly, any writing discussing the particulars of clickwrap agreements will be peppered with an occasional shrinkwrap case, and this Article proves no different.

The enforceability of clickwrap terms, which are often not known to the user until after payment, has become a subject of much debate in the

1. See *Mortgage Plus, Inc. v. DocMagic, Inc.*, No. 03-2582-GTV-DJW, 2004 WL 2331918, at *4 (D. Kan. Aug. 23, 2004); *i.LAN Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337 (D. Mass. 2002); Kaustuv M. Das, Comment, *Forum Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the "Reasonably Communicated" Test*, 77 WASH. L. REV. 481, 497 (2002); Dawn Davidson, Comment, *Click and Commit: What Terms Are Users Bound to When They Enter Websites?*, 26 WM. MITCHELL L. REV. 1171, 1181-82 (2000).

2. *Mortgage Plus, Inc.*, 2004 WL 2331918, at *4; Davidson, *supra* note 1, at 1180-82.

3. Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 476 (2002).

courts.⁴ Because many of the clickwrap cases have been fact-based decisions with seemingly contradictory conclusions, various scholarly and academic writings have pointed out the need for a heightened degree of clarity and certainty concerning the enforceability of clickwrap agreements.⁵ Some scholars contend, for instance, that even the federal appellate circuits⁶ are split on whether clickwrap agreements are enforceable.⁷

The aim of this Article is to provide clarity to the clickwrap debate and to argue that the legal reasoning behind the various clickwrap decisions has, in fact, been relatively consistent. More importantly, this Article illustrates that clickwrap agreements are a legitimate form of contracting, and that objections to clickwrap are substantially no different than objections to most other forms of contracts.

In analyzing clickwrap cases, one can easily become entangled in various disputes, such as the applicability of prevailing Uniform Commercial Code (UCC) provisions or whether the UCC applies at all. This Article endeavors to slice through such entanglements and identifies four critical issues at the heart of the clickwrap debate: (1) the requirement for notice of contractual terms, (2) the necessary opportunity to review and reject the terms, (3) the impact of adhesion doctrines on standardized contracts, and (4) the effect of prior written agreements on clickwrap. The first two issues, “notice of terms” and “review and rejection,” are, of course, necessary ingredients in establishing a manifestation of contractual assent.⁸ Accordingly, Parts I and II of this Article are dedicated to questions of whether a meeting of the minds can be formulated in a purely electronic agreement. Specifically, Part I of this Article will briefly discuss the general legality of electronic transactions and the reason that buyer assent to clickwrap

4. James C. Hoye, Note, *Click—Do We Have a Deal?*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 163, 165 (2001); Kevin W. Grierson, Annotation, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R.5TH 309 (2003).

5. Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 113 & n.343 (2003); William J. Condon, Jr., Comment, *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 434 (2004); Das, *supra* note 1, at 504–05; Hoye, *supra* note 4, at 165.

6. There are currently no Supreme Court decisions related to the enforceability of clickwrap. Condon, *supra* note 5, at 446.

7. Bartow, *supra* note 5, at 113 & n.343; Ron Corbett, *IP Strategies for Start-Up Ecommerce Companies in the Post-Dot-Bomb Era*, 8 TEX. WESLEYAN L. REV. 643, 661–62 & n.136 (2002).

8. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 430–31 (2d Cir. 2004).

remains an issue. Part II provides an in-depth discussion of mutual assent in clickwrap, specifically the above mentioned requirements of notice and the requisite ability to review and reject. In exploring the issues of notice and the ability to reject, Part II will necessarily consider the impact of such factors on both online and CD clickwrap. Next, Part III will assess the contract of adhesion questions that are inherent in clickwrap agreements, and Part IV will follow with a discussion concerning the impact on clickwrap of prior written agreements.

I. THE VALIDITY OF ELECTRONIC TRANSACTIONS AND THE REMAINING QUESTION OF ASSENT IN CLICKWRAP

A. UETA and the Enforceability of Electronic Documents

The enforceability of a written provision in downloadable electronic form has been settled by the passage and adoption of the Uniform Electronic Transaction Act (UETA)⁹ and the Electronic Signatures in Global and National Commerce Act (E-Sign Act).¹⁰ The E-Sign Act provides that “a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.”¹¹ The UETA, which is of similar purpose as the E-Sign Act, was passed by the National Conference of Commissioners on Uniform State Laws in July 1999,¹² and it has been adopted by all but four states.¹³ The UETA reiterates the E-Sign Act by stating that a “contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.”¹⁴ It is of some importance to note that the E-Sign Act preempts state law only in those states that have not enacted sections 1 through 16 of the UETA.¹⁵

9. Valerie Watnick, *The Electronic Formation of Contracts and the Common Law “Mailbox Rule,”* 56 BAYLOR L. REV. 175, 189–90 (2004). See generally UNIF. ELEC. TRANSACTIONS ACT (1999), 7A(I) U.L.A. 225 (2002).

10. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (codified at 15 U.S.C. §§ 7001–7031 (2000)); *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 26 n.11 (2d Cir. 2002).

11. 15 U.S.C. § 7001(a)(1); *Specht*, 306 F.3d at 27 n.11.

12. See generally UNIF. ELEC. TRANSACTIONS ACT §§ 1–16; Watnick, *supra* note 9, at 189.

13. Only Alaska, Georgia, New York, and Washington have not enacted the UETA. Baker & McKenzie, *Global E-Commerce Law, UETA State-by-State Comparison Table*, <http://www.bakernet.com/e-commerce/uetacompar.htm> (last visited Apr. 7, 2007); see also, e.g., TEX. BUS. & COM. CODE ANN. §§ 43.001–.021 (Vernon 2002).

14. UNIF. ELEC. TRANSACTIONS ACT § 7; see Watnick, *supra* note 9, at 189.

15. Watnick, *supra* note 9, at 191.

Neither the E-Sign Act nor the UETA is intended to displace existing contract law doctrines.¹⁶ Consequently, both acts leave the determination as to whether mutual assent has occurred in an electronic transaction to general contract law.¹⁷ Notably, the official comment to the UETA cites section 3 of the Restatement (Second) of Contracts that an agreement cannot be established without a manifestation of mutual assent and that a determination of such assent is to be made in the context of the specific circumstances.¹⁸

B. The Impersonal Nature of Clickwrap: A “Meeting of the Minds” in the Absence of Communication

The debate on the enforceability of clickwrap has predominantly occurred with regard to the doctrine of assent. The mutuality of assent or a meeting of the minds is essential to the formation of an enforceable contract.¹⁹ Whether it is executed electronically or via a physical document, a transaction, in order to be a contract, requires a manifestation of agreement between the parties.²⁰ The impersonal nature of clickwrap agreements, however, raises substantive questions with regard to contractual assent. In a clickwrap agreement, the same terms are presented to all users, and “the parties do not meet face-to-face or personally communicate.”²¹ Considering such an impersonal method of contracting, can there be assurances that a meeting of the minds has actually occurred?²² To phrase the question more precisely, do clickwrap agreements represent a meeting of the minds under traditional contract law?

16. *Id.* at 192.

17. *Id.* at 190–92.

18. UNIF. ELEC. TRANSACTIONS ACT § 2 cmt. 1; Watnick, *supra* note 9, at 190.

19. Hatch v. Oil Co., 100 U.S. 124, 133 (1879); Utley v. Donaldson, 94 U.S. 29, 47 (1876); RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981).

20. Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 29, 31 (2d Cir. 2002); Forrest v. Verizon Commc’ns, Inc., 805 A.2d 1007, 1011 (D.C. 2002).

21. Wei Wei Jeang & Ronin A. Brooks, *Current On-Line Issues*, 8 TEX. WESLEYAN L. REV. 615, 623 (2002).

22. Casamiquela, *supra* note 3, at 492 (arguing that a meeting of the minds cannot occur in this context).

II. MUTUAL ASSENT IN CLICKWRAP: THE REQUIREMENT OF NOTICE AND THE RIGHT TO REVIEW AND REJECT

A. *The Validity of Online Clickwrap: Determining Conspicuous Notice and the Ability to Reject*

1. Constructive Notice in Online Clickwrap

The seminal case regarding assent in Internet-based contracts is *Specht v. Netscape Communications Corp.*²³ In *Specht*, defendant Netscape Communications Corp. (Netscape) invited users to download free copies of its software program, SmartDownload, which it had made available on its Web site.²⁴ By clicking on an icon that indicated their desire to obtain SmartDownload, users were able to download Netscape's software onto their hard drives.²⁵ Netscape argued that by accessing SmartDownload, such users had consented to the license terms that Netscape had identified on its Web site.²⁶ Netscape did not, however, require users to click an "I agree" icon (or a similar form of physical acceptance) prior to accessing SmartDownload.²⁷ On the contrary, the only reference to Netscape's license agreement appeared in the text of a link well below the software download symbol.²⁸ Such text urged users to "[p]lease review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software."²⁹ The text of this link was visible to users only when they scrolled down to the bottom of the SmartDownload Web page.³⁰ The central issue of the case, according to the court, was whether the user plaintiffs had constructive notice of the terms of Netscape's agreement.³¹

In light of the features of Netscape's Web site and the location of its terms, the Court of Appeals for the Second Circuit held that Netscape had not provided sufficient notice of its terms to demonstrate a user's manifestation of assent to Netscape's licensing agreement.³² In formulating its holding and analyzing the enforceability of online

23. *Specht*, 306 F.3d at 17; Casamiquela, *supra* note 3, at 481–83.

24. *Specht*, 306 F.3d at 21–22.

25. *Id.*

26. *Id.* at 27.

27. *Id.* at 31–32.

28. *Id.* at 23.

29. *Id.*

30. *Id.*

31. *Id.* at 27, 31–32.

32. *Id.* at 35.

contracts, the court established a two-tiered requirement of “reasonably conspicuous notice” and “unambiguous manifestation of assent.”³³ The court maintained that “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms . . . are essential if electronic bargaining is to have integrity and credibility.”³⁴ Without such reasonably conspicuous terms, the court declared that electronic contracts cannot “be analogized to those in the paper world of arm’s-length bargaining.”³⁵ The principles of constructive notice apply “equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to ‘Download Now!’”³⁶

The court did acknowledge Netscape’s argument that the position of the computer scroll bar could have indicated to users that further information remained below the SmartDownload icon.³⁷ The court held, however, that simply because a user may have known additional information existed below the icon did not mean that the user should have reasonably concluded that a license agreement appeared in such a location.³⁸ The court pointed out that there was no reason to assume users would scroll down or through computer screens just because they were there.³⁹ A reference to the existence of terms on a related or associated screen is not, according to the court, sufficient to place a user on constructive notice of such terms.⁴⁰ The Second Circuit concluded that clicking on Netscape’s SmartDownload button could not communicate a user’s assent to Netscape’s agreement when the user was not provided conspicuous notice of the terms of such agreement.⁴¹

2. Requiring the Buyer to Click “I Agree”: Distinguishing Clickwrap from Browsewrap

In establishing its two-tiered test, the Second Circuit’s holding in *Specht*⁴² effectively differentiated between an enforceable clickwrap

33. *Id.*

34. *Id.*

35. *Id.* at 32.

36. *Id.* at 31.

37. *Id.* at 31–32.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 29–30, 35.

42. *Id.* at 35.

agreement and what has become commonly known as browsewrap.⁴³ Clickwrap is now defined by the courts as an electronic agreement that automatically presents contractual terms to a user and requires the user to affirmatively click an “I agree” icon prior to the agreement taking effect.⁴⁴ Browsewrap, conversely, refers to a contractual situation similar to that found in *Specht*,⁴⁵ whereby a vendor places its terms somewhere on its Web site without automatically requiring users to accept such terms.⁴⁶

From a marketing perspective, it is not difficult to understand why vendors would want to avoid forcing a user to sort through a legal document prior to purchasing their product or service.⁴⁷ In establishing legal enforceability, however, a seller’s use of a browsewrap agreement carries a substantial risk. In the Second Circuit’s decision in *Specht*, for instance, the court specifically expounded on the fact that no true clickwrap agreement accompanied the SmartDownload software.⁴⁸ Instead of a clickwrap agreement that conspicuously presented its terms and required users to affirmatively click their assent, the court noted that Netscape’s users were required to *browse* through the company’s Web site in order to access the accompanying agreement.⁴⁹ By utilizing a browsewrap format for its agreement, Netscape failed to give sufficient notice of the terms of its agreement, and as a result, Netscape’s contract was found to be unenforceable.⁵⁰

3. Deep Linking into Web Sites: The Ability to Bypass Terms Vacates a Finding of Assent

The requirement of notice of terms is especially apparent in cases involving “deep linking” into Web sites.⁵¹ Deep linking, which involves bypassing a vendor’s home page and linking directly into the interior of its Web site, was the primary issue of concern in *Ticketmaster Corp. v.*

43. Casamiquela, *supra* note 3, at 475–76, 482–83.

44. *Specht*, 306 F.3d at 22; Casamiquela, *supra* note 3, at 476.

45. *Specht*, 306 F.3d at 23.

46. Casamiquela, *supra* note 3, at 476.

47. David L. Hitchcock & Kathy E. Needleman, *Current Status of Copyright Protection in the Digital Age and Related Topics*, 8 TEX. WESLEYAN L. REV. 539, 588 (2002).

48. *Specht*, 306 F.3d at 23, 25.

49. *Id.* at 22–23.

50. *Id.* at 35.

51. *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *1–3 (C.D. Cal. Mar. 27, 2000), *aff’d*, 2 F. App’x 741 (9th Cir. 2001).

*Tickets.Com, Inc.*⁵² In *Ticketmaster Corp.*, the Web site of plaintiff Ticketmaster provided its customers with the ability to purchase tickets to its events.⁵³ The home page of Ticketmaster's Web site also contained a user agreement stipulating the terms and conditions for use of its Web site.⁵⁴

Defendant Tickets.Com also performed consumer ticket services, but in a somewhat different manner. Tickets.Com supplied an informational service regarding available tickets to specific events, and a link was given to customers to access the Web sites of the related ticket providers.⁵⁵ With regard to accessing Ticketmaster's services, the link provided by Tickets.Com transferred the customer directly to the interior of the Ticketmaster Web site, thereby bypassing Ticketmaster's home page and its accompanying agreement.⁵⁶ Ticketmaster brought breach of contract claims against Tickets.Com on the basis of the terms and conditions on Ticketmaster's home page.⁵⁷ The pertinent terms of the agreement provided that any entity going beyond the home page agreed to the terms and conditions therein, including provisions that the information was for personal use only, was not to be used for commercial purposes, and that no deep linking was allowed.⁵⁸

The court rejected Ticketmaster's claim and specifically contrasted Ticketmaster's Web site agreement with that of a typical clickwrap agreement.⁵⁹ The court pointed out that although many Web sites require the user to click on an icon agreeing to specific terms and conditions, Ticketmaster's site did not.⁶⁰ Further, the court stated that the terms were set forth in a manner that required the customer to scroll through the home page just to find and read them.⁶¹ More importantly, if a user bypassed the home page, Ticketmaster's terms never appeared, and the court asserted that no individual can reasonably be expected to agree to unknown terms.⁶² The court concluded, not surprisingly, that Ticketmaster failed to give conspicuous notice of the terms of the

52. *Id.* at *1-2.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at *3.

58. *Id.* at *1-3.

59. *Id.* at *3.

60. *Id.*

61. *Id.*

62. *Id.*

agreement, and without such notice, an unambiguous manifestation of assent to such terms could not occur.⁶³ Much like Netscape in *Specht*, Ticketmaster could not verify assent to its agreement because it could not verify that its users had knowledge, constructive or otherwise, of the agreement's terms.⁶⁴

4. The Necessary Opportunity to Reject: Invalidating "Assent Now, Terms Later" Contracts

Inherent in the ability to give unambiguous and affirmative assent is also the ability to reject. In *Register.com, Inc. v. Verio, Inc.*,⁶⁵ the users' inability to reject an agreement served to invalidate the plaintiff's online contract.⁶⁶ The plaintiff, Register.com, provided services through its Web site to search for entities that had registered Internet domain names.⁶⁷ Subsequent to each search result, Register.com's terms of use were automatically provided to the user.⁶⁸

The Second Circuit ruled that such "assent now, terms later" contracts are not enforceable because they eliminate the user's necessary ability to reject the agreement.⁶⁹ "A party cannot," the court declared, "manifest assent to the terms and conditions of a contract prior to having an opportunity to review them; a party must be given some opportunity to reject or assent."⁷⁰ The court noted that Register.com did not utilize a standard clickwrap agreement, whereby access to its services would be withheld until a party affirmatively assented to its terms.⁷¹ On the contrary, by the time Register.com had presented its terms of agreement, it had already provided its services.⁷² Under such an agreement, the court stated that the user would have no opportunity to reject Register.com's terms and "would be bound to comply with them irrespective of actual assent."⁷³ Importantly, the court held that even multiple search submissions on Register.com's Web site

63. *Id.*

64. *Id.*

65. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004).

66. *Id.* at 430–31.

67. *Id.* at 395.

68. *Id.* at 395–98.

69. *Id.*

70. *Id.* at 430.

71. *Id.* at 429.

72. *Id.* at 431.

73. *Id.*

would not necessarily equate to assent to its terms.⁷⁴ Although repeated exposure would have put the users on notice that Register.com's terms existed, it is also arguable that each time a user utilized Register.com's services, the user could reject such terms and never manifest assent.⁷⁵ While Register.com's automatic presentation of terms obviously met the first requirement in *Specht*⁷⁶ of conspicuous notice, its online contract clearly failed the second test of unambiguous manifestation of assent.⁷⁷

5. Confirming the Validity of Online Clickwrap

When an online agreement meets the two-part test of "conspicuous notice" and "explicit assent" (to include the ability to reject), the courts have accordingly held such agreements to be valid and enforceable.⁷⁸ By automatically presenting its terms and conditions, an online clickwrap agreement undoubtedly provides the user with conspicuous notice of its terms.⁷⁹ Additionally, a manifestation of assent is unambiguous when the user is required to click a link verifying agreement following the presentation of such terms.⁸⁰ Importantly, the user is also provided a full opportunity to review and reject such terms prior to receiving the accompanying product or service.⁸¹

For example, in *Caspi v. Microsoft Network, L.L.C.*,⁸² the Superior Court of New Jersey upheld Microsoft's online subscriber agreement that required a user to click "I agree" to an obligatory number of terms prior to accessing services.⁸³ The court ruled that such users were "given ample opportunity to affirmatively assent to the [agreement] . . . and 'retained the option of rejecting the contract with impunity.'"⁸⁴

74. *Id.*

75. *Id.*

76. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002).

77. *Register.com, Inc.*, 356 F.3d at 431; *Specht*, 306 F.3d at 35.

78. Casamiquela, *supra* note 3, at 486–87; Condon, *supra* note 5, at 454–56.

79. The phrase "online clickwrap agreement" should be differentiated from the previously described browsewrap agreements, "assent now, terms later" contracts, and clickwrap agreements that permit deep linking. *Specht*, 306 F.3d at 23, 25, 30, 35. A true online clickwrap agreement automatically presents the terms of the contract, cannot be bypassed by deep linking into the seller's Web site, and forces the user to click an acceptance icon prior to receiving services. *Id.*; see also *Register.com, Inc.*, 356 F.3d at 429–30; *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *1–3 (C.D. Cal. Mar. 27, 2000), *aff'd*, 2 F. App'x 741 (9th Cir. 2001).

80. See Casamiquela, *supra* note 3, at 486–87; Condon, *supra* note 5, at 454–56.

81. See sources cited *supra* note 80.

82. *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

83. *Id.* at 530–31.

84. *Id.* at 531.

Similarly, in *Forrest v. Verizon Communications, Inc.*,⁸⁵ the District of Columbia Court of Appeals concluded that by clicking an “accept” button after scrolling through the mandatory terms of Verizon’s Internet subscriber agreement, the subscriber had sufficiently demonstrated assent to Verizon’s agreement.⁸⁶ In support of its opinion, the court stated decisively that “[a] contract is no less a contract simply because it is entered into via a computer.”⁸⁷

The necessary opportunity to review and reject was also specifically addressed in *Moore v. Microsoft Corp.*⁸⁸ when a New York appellate court ruled that Microsoft’s clickwrap agreement was a binding contract.⁸⁹ In dismissing the plaintiff’s claims against Microsoft, the court noted that the plaintiff was provided the opportunity to read and reject Microsoft’s contract at leisure.⁹⁰ By clicking the “I agree” icon after such an opportunity, the plaintiff clearly manifested assent to Microsoft’s agreement.⁹¹

The courts in online clickwrap cases have, therefore, established two critical factors in determining the enforceability of Internet contracts. First, there must be conspicuous notice of the agreement’s terms, and such terms must be presented prior to the user accessing the related product or service.⁹² Second, a user’s manifestation of assent must be unambiguous, and such unambiguous assent cannot be confirmed without the prior ability to review and reject the terms of the agreement.⁹³ If, however, an affirmative response to both these tests is required to validate online agreements, how then can CD clickwrap agreements, which are generally not reviewed by the buyer until after purchase, be considered a legitimate form of contracting? If the ability to review and reject prior to accessing services is a requirement of an enforceable electronic agreement, is it still possible that CD clickwrap could also be held enforceable? The answer is yes, and the legal reasoning behind such a holding is the subject of the next section.

85. *Forrest v. Verizon Commc’ns, Inc.*, 805 A.2d 1007 (D.C. 2002).

86. *Id.* at 1010–11.

87. *Id.* at 1011.

88. *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91 (N.Y. App. Div. 2002).

89. *Id.* at 92.

90. *Id.*

91. *Id.*

92. *Forrest*, 805 A.2d at 1010–11, 1013; *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999); *Moore*, 741 N.Y.S.2d at 92.

93. *Moore*, 741 N.Y.S.2d at 92.

B. The Enforceability of CD Clickwrap: Notice on the Outside, Terms on the Inside, and a Right to Return

1. Required Notice of Subsequent Terms and an Ability to Reject by Return

Much like the case law involving online agreements, the requirement for notice of terms prior to purchase becomes essential in establishing the enforceability of CD clickwrap. In CD clickwrap cases, however, the mandatory notice requirement converts to an obligation for notice that *additional terms* will be incorporated *after* purchase.⁹⁴ Similarly, the ability to read and reject becomes the ability to return.⁹⁵ The rationale behind these doctrines is found in the Seventh Circuit Court of Appeal's decision in *ProCD, Inc. v. Zeidenberg*, the seminal case on CD Clickwrap.⁹⁶

In *ProCD, Inc.*, the defendant, Matthew Zeidenberg, purchased a CD-ROM directory database from the plaintiff, ProCD, and subsequently began utilizing the database for commercial purposes. ProCD filed suit against Zeidenberg alleging that Zeidenberg's commercial use of its product violated the associated software license agreement.⁹⁷ ProCD's license accompanied the software both in the form of shrinkwrap as well as a typical clickwrap agreement that splashed across Zeidenberg's computer screen each time the software was used.⁹⁸ The clickwrap agreement barred a user of ProCD's software from accessing the database services unless such user provided an affirmative assent to the software terms.⁹⁹ Additionally, the outside of each box containing the software declared that the product would be subject to the license agreement contained within.¹⁰⁰

In asserting his case, Zeidenberg argued that a contract was formed with ProCD when he purchased the software, and, therefore, ProCD's clickwrap agreement constituted additional terms to the contract that he had not accepted. The Seventh Circuit agreed that a contract includes

94. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450–53 (7th Cir. 1996).

95. *Hill*, 105 F.3d at 1150; *ProCD, Inc.*, 86 F.3d at 1450–53.

96. *See i.LAN Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337 (D. Mass. 2002); Jeang & Brooks, *supra* note 21, at 623; *see also* Condon, *supra* note 5, at 438.

97. *ProCD, Inc.*, 86 F.3d at 1447.

98. Although *ProCD, Inc.* contained the elements of both clickwrap and shrinkwrap, many cases and scholars still refer to *ProCD, Inc.* as a shrinkwrap case. *E.g., i.LAN Sys., Inc.*, 183 F. Supp. 2d at 337; *see* Casamiquela, *supra* note 3, at 481–85.

99. *ProCD, Inc.*, 86 F.3d at 1450.

100. *Id.*

only those terms that the parties have affirmatively agreed to and that a party cannot assent to hidden terms.¹⁰¹ The court held, however, that one of the terms to which Zeidenberg agreed to when he purchased the software was the inclusion of ProCD's license agreement.¹⁰²

In substantiating its holding, the court highlighted a number of example transactions whereby the exchange of money precedes the communication of detailed terms, such as airline transportation, insurance contracts, and tickets to a concert or theatre.¹⁰³ Simply because it was an electronic transaction, the court proclaimed, did not necessarily invalidate a "money now, terms later" agreement.¹⁰⁴ The Seventh Circuit pointed out that a vendor cannot reasonably be expected to print its entire license agreement on the outside of its packages, and to do so would eliminate other information that buyers would presumably find more useful.¹⁰⁵ The solution, according to the court, is for vendors to provide notice that additional terms will accompany the product and to provide a reasonable time period to return the accompanying product if such terms are deemed undesirable.¹⁰⁶ "Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable," the court declared, "may be a means of doing business valuable to buyers and sellers alike."¹⁰⁷ Accordingly, the court maintained that ProCD specifically extended to Zeidenberg such an opportunity to reject. "Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods."¹⁰⁸ The court concluded, therefore, that CD clickwrap agreements, such as those utilized by ProCD, are "enforceable unless their terms are objectionable on grounds applicable to contracts in general."¹⁰⁹

One year later, the Seventh Circuit reaffirmed its decision in *ProCD, Inc.* when it was faced with a shrinkwrap case in *Hill v. Gateway 2000, Inc.*¹¹⁰ In *Hill*, a consumer ordered a computer by phone from Gateway

101. *Id.*

102. *Id.*

103. *Id.* at 1451.

104. *Id.* at 1452.

105. *Id.* at 1450-51.

106. *Id.*

107. *Id.* at 1451.

108. *Id.* at 1453.

109. *Id.* at 1449.

110. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

2000, Inc. (Gateway).¹¹¹ When the computer arrived, it contained a shrinkwrap license agreement that governed the terms of purchase unless the computer was returned within thirty days.¹¹² Although no details of terms were discussed when the consumer placed his phone order, the court pointed out that the consumer knew from Gateway's advertisements that additional contractual terms would accompany the purchase.¹¹³ The court held that given notice of terms and a chance to inspect both the item and the terms, the consumer had affirmatively assented to Gateway's license agreement when he kept the computer for more than the specified thirty-day return period.¹¹⁴ In confirming the *ProCD, Inc.* doctrine of "notice on the outside, terms on the inside, and a right to review and reject," the Seventh Circuit in *Hill* established what has become known as the "layered contract" approach, whereby the timing of the contract's execution is somewhat indefinite.¹¹⁵

Nevertheless, in two additional cases involving "money now, terms later" agreements, the courts invalidated the vendors' shrinkwrap agreements.¹¹⁶ Interestingly, the first case was extremely similar to *Hill* and also involved Gateway.

2. Unambiguous Assent: Establishing Proper Notice of Subsequent Terms

In *Klocek v. Gateway, Inc.*,¹¹⁷ the U.S. District Court of Kansas found Gateway's shrinkwrap agreement to be unenforceable because Gateway failed to provide adequate notice that additional terms would be incorporated into the purchase.¹¹⁸ As in *Hill*, Gateway supplied the consumer with a computer that contained a shrinkwrap agreement stipulating that additional terms and conditions would be automatically incorporated into the purchase following the expiration of a five-day review and return period.¹¹⁹

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313 (Wash. 2000).

116. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000); *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993).

117. *Klocek*, 104 F. Supp. 2d 1332.

118. *Id.* at 1341.

119. *Id.*

The court held the dispute to be governed by section 2-207 of the UCC,¹²⁰ which provides that any additional terms proposed that are different from those offered and agreed upon constitute either an expression of acceptance or merely a written confirmation of agreement.¹²¹ By basing its decision on section 2-207, the court specifically rejected the reasoning established by the Seventh Circuit¹²² in *ProCD, Inc. and Hill*.¹²³ The Court declared that in both *ProCD, Inc. and Hill*, “the Seventh Circuit concluded without support that UCC § 2-207 was irrelevant,” and that such a conclusion was in direct contradiction to the official comment to section 2-207.¹²⁴ The court explicitly stated that it was “not persuaded . . . [to] follow the Seventh Circuit[’s] reasoning.”¹²⁵ Somewhat ironically, however, the *Klocek* court did just that and based its ultimate decision on the “notice of subsequent terms” theory established in *ProCD, Inc.*¹²⁶

In holding Gateway’s agreement to be unenforceable, the court stated that there was “no evidence that . . . [Gateway] informed . . . [the consumer] of the five-day review-and-return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement.”¹²⁷ The court acknowledged that under section 2-207 of the UCC, it was possible to argue that Gateway’s shrinkwrap agreement was a conditional expression of acceptance constituting a counteroffer.¹²⁸ To constitute a valid counteroffer, however, the court held that Gateway was required to expressly make its acceptance conditional on the consumer’s assent to the additional or different terms.¹²⁹ The court found that Gateway provided no indication that it was unwilling to

120. *Id.* at 1339.

121. *Id.*

122. The Seventh Circuit held that section 2-207 of the UCC applied only to a traditional “battle-of-the-forms” case. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996). Because the dispute in the case involved a consumer transaction with only one form (the seller’s license), the court concluded that section 2-207 was irrelevant. *Id.* Instead, the court based its decision on section 2-204, which states that “[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” *Id.* (quoting UNIF. COMMERCIAL CODE § 2-204(1) (amended 1993)).

123. *Klocek*, 104 F. Supp. 2d at 1339–40.

124. *Id.* at 1339.

125. *Id.*

126. *Id.* at 1340–41.

127. *Id.* at 1341.

128. *Id.* at 1340.

129. *Id.*

proceed without the consumer's agreement to its shrinkwrap.¹³⁰ The court stated that "it is not unreasonable for a vendor to clearly communicate to a buyer—at the time of sale—... the fact that the vendor will propose additional terms as a condition of sale."¹³¹ A seller, the court declared, must communicate to a purchaser an unwillingness to proceed in the absence of a buyer's agreement to additional terms.¹³² In the absence of such notice, the mere fact that the consumer kept the product longer than Gateway's stipulated review and return period was not sufficient to establish unambiguous assent to Gateway's terms.¹³³

3. The Insufficiency of Notice Without the Ability to Reject and Return

Regardless of how conspicuously a seller displays the terms of its CD clickwrap agreement, the contract will not be held enforceable if the buyer was given no opportunity to reject the terms of the agreement and return the product.¹³⁴ The court's reasoning in *Arizona Retail Systems, Inc. v. Software Link, Inc.*¹³⁵ emphatically illustrates this point.

In *Arizona Retail Systems, Inc.*, the court both upheld and dismissed two types of shrinkwrap agreements that were coupled with identical software and purchased by the same buyer from the same company.¹³⁶ The seller in this case, The Software Link, Inc., had shipped the buyer its software containing a shrinkwrap license agreement, but had done so *without* a notice that additional terms would be incorporated into the software purchase.¹³⁷ On the initial purchase, the seller shipped both a test version of the software as well as a live, functional version.¹³⁸ The language printed on the software package stated that by opening the software, the user would be bound by all terms of the license incorporated inside.¹³⁹ Nevertheless, the court upheld the shrinkwrap agreement in the initial purchase because the test software module enabled the user to accept or reject the live version of the software prior

130. *Id.* at 1341.

131. *Id.* at 1341 n.14.

132. *Id.* at 1340 (quoting *Brown Mach., Inc. v. Hercules, Inc.*, 770 S.W.2d 416, 420 (Mo. Ct. App. 1989)).

133. *Id.* at 1341.

134. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 430 (2d Cir. 2004); *Boomer v. AT&T Corp.*, 309 F.3d 404, 414–15 (7th Cir. 2002); *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 763–66 (D. Ariz. 1993).

135. *Ariz. Retail Sys., Inc.*, 831 F. Supp. at 763–66.

136. *Id.*

137. *Id.* at 760–62.

138. *Id.*

139. *Id.*

to its installation.¹⁴⁰ When the same user made subsequent purchases of the software, however, the product did not include a module that provided the user an opportunity to either refuse or consent to the license.¹⁴¹ The court held the subsequent shrinkwrap license to be invalid because it failed to provide the purchaser of the software an opportunity to review and reject the software and the terms of purchase.¹⁴² The court asserted that the shrinkwrap constituted proposed modifications to the contract by the seller, and under section 2-209 of the UCC, assent to such proposed contractual modifications must be express.¹⁴³

The second software purchase in *Arizona Retail Systems, Inc.* points out the insufficiency of mere notice of terms.¹⁴⁴ The buyer in this case knew from the first purchase that terms would be forthcoming on the second shipment.¹⁴⁵ By stipulating that the terms became effective upon opening the software, however, the seller eliminated the buyer's opportunity to review and reject the license agreement.¹⁴⁶ As numerous courts have found, CD clickwrap agreements can bind a consumer only when that consumer is given both prior notice that additional terms will be incorporated into the agreement *and* a right to read and reject such terms if they are deemed unacceptable.¹⁴⁷ Such a right to "read and reject" is imperative to sufficiently show mutual assent.¹⁴⁸ Provided that notice is given, therefore, clicking on an "I agree" icon will be considered explicit assent if the user is afforded (1) a chance to inspect both the items and the terms, and (2) an opportunity to reject such terms by returning the product for a full refund.¹⁴⁹

140. *Id.* at 764.

141. *Id.* at 764–65.

142. *Id.*

143. *Id.* at 764.

144. *Id.* at 764–65.

145. *See generally id.* at 759.

146. *Id.* at 764–65.

147. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996); *i.LAN Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 336–37 (D. Mass. 2002); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 312–13 (Wash. 2000).

148. *Register.com, Inc. v. Verio, Inc.*, 365 F.3d 393, 430 (2d Cir. 2004); *ProCD, Inc.*, 86 F.3d at 1451; *Klocek*, 104 F. Supp. 2d at 1341.

149. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997); *ProCD, Inc.*, 86 F.3d at 1451; *Mortenson Co.*, 998 P.2d at 312–13.

4. Reconciling Disparity in CD Clickwrap

Regardless of whether clickwrap agreements are reviewed as part of a “layered contract,” as proposed modifications, or as counteroffers under the UCC, the key element is explicit assent. This explicit assent cannot be established without the ability to reject.¹⁵⁰ Although the court decisions discussed above may be conflicting in their final holdings, the differences in legal reasoning between the courts may not be as divergent as it would first appear. In the final analysis, these cases actually are in agreement that a prior contract of *some* kind was, in fact, formed.¹⁵¹ In upholding the validity of clickwrap agreements, for example, the Court of Appeals for the Seventh Circuit held that when the buyer purchased the software, one of the terms the buyer agreed to was that the purchase contract was subject to the additional terms of the seller’s license agreement.¹⁵² The court also declared that a buyer cannot agree to hidden terms.¹⁵³ It can be argued that the Seventh Circuit’s decision viewed the original purchase contract as one in which the buyer agreed to the review and possible inclusion of the seller’s additional terms.¹⁵⁴ The court in *Klocek*, conversely, held that the original purchase agreement contained no presence of provisions incorporating the possible inclusion of additional terms.¹⁵⁵ Consequently, the *Klocek* court held the associated shrinkwrap agreement to be unenforceable.¹⁵⁶ Most interesting, however, was the decision in *Arizona Retail Systems, Inc.*, in which the court found one software license to contain the ability to reject while another license for the same software did not.¹⁵⁷ The court, therefore, invalidated one contract while enforcing the other.¹⁵⁸

150. *See* *Ariz. Retail Sys., Inc.*, 831 F. Supp. at 759.

151. *ProCD, Inc.*, 86 F.3d 1447; *Klocek*, 104 F. Supp. 2d 1332; *Ariz. Retail Sys., Inc.*, 831 F. Supp. 759.

152. *ProCD, Inc.*, 86 F.3d at 1450.

153. *Id.*

154. *Id.* at 1447.

155. *Klocek*, 104 F. Supp. 2d at 1340–41.

156. *Id.*

157. *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 763–66 (D. Ariz. 1993).

158. *Id.*

5. Clarifying Notice of Subsequent Terms and the Proper Period of Review

The primary variables, it appears, are not the relevant UCC sections or whether a “layered contract” exists, but rather the methodology utilized by the seller in communicating its wish to incorporate subsequent terms and the time period given to the consumer to review the terms. Given these variables, two key issues arise: (a) the required clarity of notice in communicating such terms, and (b) the length of time a buyer must reasonably be given to review the terms.

a. Clarity of Notice

In discussing the issue of notice, the Court of Appeals for the Seventh Circuit held ProCD’s clickwrap agreement to be enforceable, in part, because it specifically communicated the subsequent inclusion of the seller’s full license agreement.¹⁵⁹ One year later, however, in *Hill*, the Seventh Circuit required only a notice that some additional terms would be included.¹⁶⁰ Alternatively, in the District of Kansas, the court declared that a vendor must *clearly* communicate the inclusion of its standard terms.¹⁶¹ Similarly, in *Arizona Retail Systems, Inc.*, the court proclaimed that a seller must communicate to the buyer the subsequent inclusion of any terms it deems essential.¹⁶² Although the Seventh Circuit in *Hill* was somewhat lenient in the notice methodology required, counsel should be forewarned that most clickwrap cases have compelled the seller to clearly and conspicuously communicate intent to include subsequent terms.¹⁶³

159. *ProCD, Inc.*, 86 F.3d at 1450.

160. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (holding that prior advertisements that included certain terms, such as warranties and disclaimers, constituted sufficient notice to a buyer placing a phone order that there would be inclusion of subsequent terms).

161. *Klocek*, 104 F. Supp. 2d at 1340–41 (holding that because the seller did not clearly communicate to the buyer that the contract was subject to additional terms, the contract was unenforceable).

162. *Ariz. Retail Sys., Inc.*, 831 F. Supp. at 765 & n.3 (holding that a shrinkwrap agreement was unenforceable because the subsequent inclusion of terms was not made apparent to the buyer at the time of acceptance).

163. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 430 (2d Cir. 2004); *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 30–32 (2d Cir. 2002); *Klocek*, 104 F. Supp. 2d at 1340–41; *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *1–3 (C.D. Cal. Mar. 27, 2000), *aff’d*, 2 F. App’x 741 (9th Cir. 2001); *Ariz. Retail Sys., Inc.*, 831 F. Supp. at 765.

b. Determining a Reasonable Length of Review

Much like what constitutes conspicuous notice, the required period of review also seems somewhat unclear. Granted, courts have made it evident that the period for the review of terms must be reasonable.¹⁶⁴ For instance, in rejecting the seller's shrinkwrap agreement, the court in *Klocek* noted a critical difference between the thirty-day return period in the Seventh Circuit's decision in *Hill* and the five-day return period involved in its case.¹⁶⁵ Nevertheless, neither the *Hill* decision nor other judgments have established a minimum requisite time period for a user's review of enforceable clickwrap terms.¹⁶⁶

Considering the current state of clickwrap case law, it is doubtful such a review period will be defined by the courts at any time in the near future. As the court in *Caspi* pointed out, reasonable notice, to include an adequate period to reject, is a question of law for courts to decide.¹⁶⁷ Nevertheless, in reviewing CD clickwrap agreements that courts have deemed enforceable, it seems safe to assume that courts would consider a thirty-day review period to be reasonable.¹⁶⁸

6. The Ability to Reject and Freedom to Contract

The "ability to reject" requirement, as it relates to clickwrap, results in an additional intriguing issue related to the standardized format and lack of negotiation in clickwrap. A contractual process, after all, has its greatest appeal when two parties are allowed to freely negotiate their associated benefits from the bargain.¹⁶⁹ Such bargaining theoretically leads to a mutual assent and a meeting of the minds.¹⁷⁰ Clickwrap

164. *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532–33 (N.J. Super. Ct. App. Div. 1999).

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

166. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450–51 (7th Cir. 1996); *Caspi*, 732 A.2d at 532–33.

167. *Caspi*, 732 A.2d at 532–33; *see also, e.g.*, *Motise v. Am. Online, Inc.*, 346 F. Supp. 2d 563 (S.D.N.Y. 2004).

168. *See, e.g.*, *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998) (holding that the plaintiff's decision to retain the product beyond the specified thirty-day return period constituted acceptance of the defendant's agreement).

169. Vincent M. Roche, "Bashing the Corporate Shield": *The Untenable Evisceration of Freedom of Contract in the Corporate Context*, 28 J. CORP. L. 289, 292 (2003).

170. *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 864 (1983) (Blackmun, J., dissenting); *Hatch v. Oil Co.*, 100 U.S. 124, 133 (1879); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 906 (2003); Nicholas S. Shantar, Note, *Forum Selection Clauses: Damages in Lieu of Dismissal?*, 82 B.U. L. REV. 1063, 1080 (2002).

agreements, however, do not necessarily represent a meeting of the minds traditionally present in conventional contracts.¹⁷¹ A clickwrap agreement only provides the user with the ability to accept or reject the contract; negotiation, in the traditional sense, is generally not possible.¹⁷² The following question then arises: What is the impact on a clickwrap agreement when one party feels it has no choice but to accept the agreement? Such contracts are typically referred to as contracts of adhesion,¹⁷³ and the nature of clickwrap agreements makes them inherently associated with such a label.¹⁷⁴

III. CLICKWRAP AS A CONTRACT OF ADHESION: THE BENEFIT OF A STANDARDIZED CONTRACT VERSUS UNCONSCIONABLE TERMS

A. *Defining Clickwrap as an Adhesion Contract: Standardized Terms, No Negotiation, and Unequal Bargaining Power*

A contract of adhesion is generally defined as a standardized contract, imposed by a party of superior bargaining strength, that provides the other party only the ability to reject or accept it.¹⁷⁵ Clickwrap agreements, by definition, fall into such a category. Clickwrap agreements are, after all, typically standardized contracts that are executed with no negotiation between the parties.¹⁷⁶ As should be expected, however, it would be a mistake to assume that such categorization alone invalidates a clickwrap agreement.

B. *Validating Standardized Contracts: The Requirement of a “Reasonable Expectation” of Negotiation*

The U.S. Supreme Court made it clear in *Carnival Cruise Lines, Inc. v. Shute*¹⁷⁷ that the enforceability of a contract is not necessarily tied to

171. Casamiquela, *supra* note 3, at 492; Reichman & Franklin, *supra* note 170, at 906.

172. *See* Roche, *supra* note 169.

173. *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (defining contract of adhesion as a “standardized contract, which, imposed and drafted by the party of a superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it” (quoting *Armendariz v. Found. Health Psychare Serv.*, 6 P.3d 669 (Cal. 2000))); *Serv. Corp. Int’l v. Lopez*, 162 S.W.3d 801, 809 (Tex. App.—Corpus Christi 2005, no pet.).

174. *Comb*, 218 F. Supp. 2d at 1172; Condon, *supra* note 5, at 436.

175. *Comb*, 218 F. Supp. 2d at 1172; *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998); *Serv. Corp. Int’l*, 162 S.W.3d at 809; Condon, *supra* note 5, at 436.

176. Condon, *supra* note 5, at 434.

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

negotiated terms.¹⁷⁸ In *Carnival*, the Court addressed the enforceability of a standardized form contract set forth on a cruise line ticket.¹⁷⁹ A purchaser of such a ticket argued that the terms on the ticket should not be enforced because the terms were not the product of an open negotiation.¹⁸⁰ The Court held, however, that it must be reasonable to expect negotiation, and it would be entirely unreasonable to presume negotiations should occur on contracts that are purely routine and nearly identical to every other contract a seller has issued.¹⁸¹ The Court asserted that “[c]ommon sense dictates that a ticket of this kind will be a form contract, the terms of which are not subject to negotiation and that an individual purchasing the ticket will not have bargaining parity with [the seller].”¹⁸² The significance of *Carnival* to clickwrap agreements should not be understated. *ProCD, Inc.* and numerous other clickwrap cases have cited *Carnival* when addressing the enforceability of the standardized contract format inherent in clickwrap.¹⁸³ In *Carnival*, as well as in the clickwrap and shrinkwrap cases that followed, courts stressed the pragmatism and possible functional benefits that nonnegotiable standardized contracts could offer.¹⁸⁴

C. *The Practical Benefit of Standardized Contracts*

In *ProCD, Inc.*, the court emphasized that standardized contracts are essential to a system of mass production and distribution and are valuable to buyers and sellers alike.¹⁸⁵ One cannot, according to the court, expect a seller to place its entire agreement on the outside of its merchandise.¹⁸⁶ By placing notice of terms on the outside and providing the buyer an opportunity to review and reject such terms, the court maintained that scarce resources can then be devoted to an entire class of transactions rather than expended in negotiating the details of a single contract.¹⁸⁷ “[A]djusting terms in buyers’ favor,” the court

178. *Id.* at 592–94.

179. *Id.* at 593.

180. *Id.* at 590.

181. *Id.* at 592–93.

182. *Id.* at 593.

183. *ProCD, Inc. v Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998); Condon, *supra* note 5, at 437–39.

184. *Carnival*, 499 U.S. at 594; *ProCD, Inc.*, 86 F.3d at 1451; *Brower*, 676 N.Y.S.2d at 572; Condon, *supra* note 5, at 437–38.

185. *ProCD, Inc.*, 86 F.3d at 1451.

186. *Id.*

187. *Id.*

asserted, “might help . . . [that particular buyer,] but would lead to a response, such as a higher price, that might make consumers as a whole worse off.”¹⁸⁸ In *Hill*, the Court of Appeals for the Seventh Circuit reiterated its holding in *ProCD, Inc.*, by stating that “[p]ractical considerations support allowing vendors to enclose the full legal terms with their products.”¹⁸⁹ The Seventh Circuit’s line of thought was consistent with the reasoning in *Carnival* that buyers purchasing standardized contracts may benefit from reduced pricing as a result of minimized negotiation costs.¹⁹⁰

D. Judicial Scrutiny and the Protection of Competition from Holdings of Unconscionable Terms

Although courts have rejected the notion that the enforceability of a contract is tied to open bargaining, courts have also been clear that standardized contracts are subject to judicial scrutiny for fundamental fairness.¹⁹¹ Generally, contracts that are the result of open negotiations and are unaffected by fraud or undue influence are given full effect by the courts.¹⁹² Courts, however, have placed heightened scrutiny on the terms of standardized form contracts that are offered on a “take it or leave it” basis by a party of unequally strong bargaining power.¹⁹³ Nevertheless, courts have also held that the availability of alternative sources may defeat the argument that a contract is unenforceable on the basis of adhesion.¹⁹⁴ As the Court of Appeals for the Seventh Circuit stated, “[c]ompetition among vendors, not judicial revision of a [contract’s packaging], is how consumers are protected in a market economy.”¹⁹⁵ A New York appellate court reiterated the Seventh Circuit’s holding and maintained that given “the ability to make the purchase elsewhere and the express option to return the goods, the consumer is not in a ‘take it or leave it’ position at all.”¹⁹⁶

188. *Id.* at 1453.

189. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997).

190. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991).

191. *Id.* at 595; *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203 (Tex. App.—Eastland 2001, pet. denied).

192. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13 (1972).

193. *Carnival*, 499 U.S. at 595; *Barnett*, 38 S.W.3d at 204.

194. *Carnival*, 499 U.S. at 595; *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998).

195. *ProCD, Inc.*, 86 F.3d at 1453.

196. *Brower*, 676 N.Y.S.2d at 572.

If competition assures enforceability, one might assume that a lack of competition would invalidate a contract of adhesion, such as clickwrap. To hold an adhesion contract unenforceable, however, the critical factors to be considered are associated with the doctrine of unconscionability.¹⁹⁷

E. Establishing Unconscionable Terms in the Absence of Competition

1. The Requirement to Prove Both Procedural and Substantive Unconscionability

A lack of competition will invalidate a contract only if the contract was both procedurally and substantively unconscionable when made.¹⁹⁸ A lack of competition with no negotiation possibilities in a typical contract of adhesion, such as clickwrap, will meet the criteria for procedural unconscionability.¹⁹⁹ Moreover, a claim of procedural unconscionability cannot be defeated by just any showing of possible competition.²⁰⁰ There must be reasonable competition and an ability to secure substantially similar products or services as those in question.²⁰¹

Even if an agreement is procedurally unconscionable, it may nonetheless be enforceable if the substantive terms are reasonable.²⁰² A determination of substantive unconscionability requires proof of overly harsh or one-sided terms that “shock the conscience.”²⁰³ In upholding the validity of a forum clause in a clickwrap agreement, for instance, a Texas appellate court held that even in cases of monopolies, “[i]t is the unfair use of, *not* the mere existence of, an unequal bargaining power that undermines a contract.”²⁰⁴ Accordingly, invalidating clickwrap on the basis of substantive unconscionability requires evidence that an unfair use of superior bargaining power resulted in contractual conditions so exceedingly calloused as to be unreasonably burdensome to the agreeing party.²⁰⁵

197. *Id.* at 573–74.

198. *Id.*

199. *Comb*, 218 F. Supp. 2d at 1172–73; *Brower*, 676 N.Y.S.2d at 573–74.

200. *Comb*, 218 F. Supp. 2d at 1172–73.

201. *Id.*

202. *Id.*; *Brower*, 676 N.Y.S.2d at 573–74.

203. *Comb*, 218 F. Supp. 2d at 1172; *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 314 (Wash. 2000).

204. *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 204 (Tex. App.—Eastland 2001, pet. denied) (emphasis added).

205. *Comb*, 218 F. Supp. 2d at 1172–73, 1176–77; *Mortenson Co.*, 998 P.2d at 314–16.

Several courts have held clickwrap terms to be unenforceable on the basis of the unconscionability doctrine.²⁰⁶ Nevertheless, such cases serve only to reinforce the validity of clickwrap, as it was the terms of the contract, *not* the clickwrap agreement, itself, that was held to be unenforceable.²⁰⁷

2. Demonstrating Substantive Unconscionability

In *Brower v. Gateway 2000, Inc.*, for instance, the court concluded that the arbitration clause of Gateway 2000, Inc. (Gateway) was unconscionable on the basis of an unreasonable cost to the plaintiff.²⁰⁸ Gateway's agreement required that all disputes relating to the agreement be settled by arbitration conducted in Chicago, Illinois, by an official arbitrator of the International Chamber of Commerce (ICC).²⁰⁹ The ICC's headquarters, however, was located in France, and contact with the ICC could be made only through the U.S. Council for International Business.²¹⁰ Additionally, the ICC required an advance fee of \$4,000 (more than the product in question), of which \$2,000 was nonrefundable.²¹¹ The consumer was also required to pay all of Gateway's legal fees should Gateway prevail at the arbitration.²¹² The court held that the excessive cost necessitated by such an arbitration provision was unreasonable and served to deter consumers from seeking the appropriate dispute resolution process.²¹³

While the court in *Brower* held a clickwrap provision to be unenforceable, the court in *Comb v. PayPal, Inc.* held that PayPal's clickwrap agreement was so one-sided in its entirety that it was substantively unconscionable.²¹⁴ PayPal's clickwrap agreement authorized PayPal to freeze customer accounts and retain funds that it alone determined were subject to dispute.²¹⁵ Additionally, PayPal utilized such a practice without notice to its customers.²¹⁶ As the court noted, PayPal's customers were allowed to resolve disputes only after

206. *Comb*, 218 F. Supp. 2d at 1172–77; *Brower*, 676 N.Y.S.2d at 574–75.

207. *Comb*, 218 F. Supp. 2d at 1171–72; *Brower*, 676 N.Y.S.2d at 571–72.

208. *Brower*, 676 N.Y.S.2d at 574–75.

209. *Id.* at 570.

210. *Id.* at 571.

211. *Id.*

212. *Id.*

213. *Id.* at 574–75.

214. *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1173–77 (N.D. Cal. 2002).

215. *Id.* at 1173.

216. *Id.*

PayPal had control over their disputed funds for an indefinite period.²¹⁷ The clickwrap agreement also allowed PayPal to modify or amend the agreement without notification and required customers to be bound by any such modification.²¹⁸ Moreover, PayPal's arbitration clause prohibited customers from consolidating their claims and, for many of the same reasons cited in *Brower*, was also found to be unreasonably cost-prohibitive.²¹⁹ The court found that PayPal had shown no "business realities' [to] justify such one-sidedness."²²⁰ Consequently, the court concluded that, under the totality of the circumstances, PayPal's clickwrap agreement was substantively unconscionable and unenforceable.²²¹

In neither *Brower* nor *Comb*, however, did the courts rule that the related agreements were unenforceable because of their format.²²² On the contrary, both courts held that clickwrap or shrinkwrap agreements were generally enforceable as contractual documents.²²³ In fact, when referencing the enforceability of clickwrap and shrinkwrap agreements, the *Brower* court specifically cited both *Hill* and *ProCD, Inc.* and asserted that the commonality of such agreements now enables "the consumer to make purchases of sophisticated merchandise . . . over the phone or by mail—and even by computer."²²⁴

F. The Lesson in Applying the Unconscionable Doctrine: Clickwrap Plays by the Same Rules as Any Other Contract

Whether it is an agreement executed on paper, established on the Internet, or by other electronic means, the doctrine of adhesion is applied no differently.²²⁵ Invalidating a clickwrap agreement, as with any other contract, requires not only a showing of procedural unconscionability (which clickwrap meets), but also a showing of

217. *Id.* at 1175.

218. *Id.*

219. *Id.* at 1175–77; *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574–75 (N.Y. App. Div. 1998).

220. *Comb*, 218 F. Supp. 2d at 1175.

221. *Id.* at 1177.

222. *Comb*, 218 F. Supp. 2d at 1171–72; *Brower*, 676 N.Y.S.2d at 571–72.

223. *Comb*, 218 F. Supp. 2d at 1171–72; *Brower*, 676 N.Y.S.2d at 571–72.

224. *Brower*, 676 N.Y.S.2d at 571–72 (citing *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–49 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451, 1453 (7th Cir. 1996)).

225. See *Comb*, 218 F. Supp. 2d at 1171–72; *Brower*, 676 N.Y.S.2d at 571–73; *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 204 (Tex. App.—Eastland 2001, pet. denied).

substantive unconscionability.²²⁶ Findings of unenforceability, however, have been limited, and courts have noted that the theory of unconscionability is not intended as a vortex for elements of fairness embodied by other existing law.²²⁷ Provided, therefore, that the terms of a clickwrap agreement are reasonable, then the conspicuous notice of terms and the ability to review and reject such terms will establish the enforceability of clickwrap.²²⁸ As the Seventh Circuit has stated, these types of agreements “are enforceable unless their terms are objectionable on grounds applicable to contracts in general.”²²⁹

Nonetheless, the concept of negotiation raises a final significant question with regard to clickwrap agreements, specifically as the concept relates to CD clickwrap. Because the terms of CD clickwrap typically arise subsequent to the parties’ initial transaction, it is entirely possible that a negotiated written agreement may exist prior to the appearance of such clickwrap terms. If such agreement exists, it would seem, at least on the surface, that the terms of any subsequent clickwrap agreement would be considered merely an attempt to incorporate additional terms, and such terms would be of no effect without the party’s explicit assent. Considering the fact-based analysis of clickwrap case law, however, such circumstances require further exploration.

IV. PRIOR WRITTEN AGREEMENTS: DOES THEIR EXISTENCE AUTOMATICALLY INVALIDATE A SUBSEQUENT CLICKWRAP CONTRACT?

A. *General Rules and the UCC: Determining Final Intent of the Parties Is a Question of Fact*

If an executed agreement already exists, section 2-209 of the UCC requires an express acceptance of any proposed supplemental contract terms, and such express assent cannot be inferred merely from a party’s conduct.²³⁰ When specific terms are not expressed between merchants until after the contract is formed, UCC section 2-207 governs the

226. *Comb*, 218 F. Supp. 2d at 1171–72; *Brower*, 676 N.Y.S.2d at 573–74; *Barnett*, 38 S.W.3d at 204.

227. *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 316 (Wash. 2000); see *Condon*, *supra* note 5, at 455.

228. *ProCD, Inc.*, 86 F.3d at 1449, 1451–53; *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 763–66 (D. Ariz. 1993); *Forrest v. Verizon Commc’ns, Inc.*, 805 A.2d 1007, 1010–11 (D.C. 2002); *Mortenson Co.*, 998 P.2d at 313–14, 316.

229. *ProCD, Inc.*, 86 F.3d at 1449 (referring to shrinkwrap agreements).

230. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000); *Ariz. Retail Sys., Inc.*, 831 F. Supp. at 764.

interpretation of the contract, and such terms, to the extent they materially alter the parties' agreement, are not incorporated into the parties' final agreement.²³¹ Determining which written document the parties actually intended to represent their final integrated agreement is determined on a case-by-case basis.²³² Consequently, whether the parties intended a particular written document to be the final expression of their contract terms is a question of fact and, in determining such a question, the courts may analyze the various circumstances surrounding the formation of such a contract.²³³

B. The Importance of Explicit Terms

The query is whether clickwrap constitutes additional supplemental terms to a prior written agreement that must be expressly accepted by the parties, or, conversely, whether clickwrap terms can serve to fill the gaps in an existing contract, thereby allowing such terms to be incorporated into an existing agreement. The two cases discussed below help answer these questions.

1. Trumping Clickwrap with Unambiguous Agreements and Integration Clauses

In *Morgan Laboratories, Inc. v. Micro Data Base Systems, Inc.*,²³⁴ the parties entered into an agreement in 1991 that contained an integration clause explicitly precluding any modifications to the contract without the written consent of the parties.²³⁵ The defendant, Micro Data Base Systems, Inc., claimed that the terms of its shrinkwrap license constituted necessary supplemental terms to the 1991 agreement because such agreement did not contain certain specific provisions found in the shrinkwrap license—that is, it did not contain the forum clause.²³⁶ Additionally, the defendant asserted that Morgan Laboratories accepted the additional shrinkwrap terms through its course of conduct.²³⁷ The court held, however, that a course of conduct does not replace a “no modification unless in writing” provision.²³⁸

231. *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105 (3d Cir. 1991).

232. *Mortenson Co.*, 998 P.2d at 311.

233. *Id.*

234. *Morgan Labs., Inc. v. Micro Data Base Sys., Inc.*, No. C96-3998 THE, 1997 WL 258886, at *1 (N.D. Cal. Jan. 22, 1997).

235. *Id.* at *2–3.

236. *Id.*

237. *Id.*

238. *Id.* at *3.

Assent must be express and cannot be inferred merely from conduct.²³⁹ The court maintained that although shrinkwrap may be enforceable, it cannot trump explicit prior agreements when those agreements contain a valid integration clause.²⁴⁰

2. Upholding Clickwrap: Filling the Void Left by Ambiguous Terms and a Prior Course of Conduct

M.A. Mortenson Co. v. Timberline Software Corp. demonstrated that a prior course of conduct can indeed prove relevant when an existing agreement is void of critical terms, specifically an integration clause.²⁴¹ Plaintiff M.A. Mortenson Co. (Mortenson) issued a purchase order to Timberline Software Corp. (Timberline) for an upgrade of its existing software system.²⁴² Mortenson was a construction contractor that utilized Timberline's bid analysis software when responding to construction bids.²⁴³ Mortenson had utilized Timberline's software for three years prior to initiating its purchase order to Timberline for an upgraded system.²⁴⁴ Mortenson subsequently brought suit against Timberline for breach of warranties and alleged that the upgraded software was defective.²⁴⁵ Timberline moved for summary judgment, arguing that the limitation for damages set forth in its clickwrap agreement barred Mortenson's recovery.²⁴⁶ Mortenson countered that the purchase order consisted of the entire contract between the parties and that Mortenson, therefore, never affirmatively agreed to Timberline's clickwrap agreement.²⁴⁷

The court held that the purchase order was not an integrated contract and that the terms of the clickwrap agreement were enforceable against Mortenson.²⁴⁸ In reaching its conclusion, the court specifically pointed to the prior "course of dealing" between the parties.²⁴⁹ The court noted, for instance, that Mortenson had to

239. *Id.*

240. *Id.* at *4.

241. *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313–14 (Wash. 2000).

242. *Id.* at 307–08.

243. *Id.*

244. *Id.*

245. *Id.* at 309.

246. *Id.*

247. *Id.* at 310.

248. *Id.* at 307.

249. *Id.* at 313–14.

explicitly assent to the software license by clicking “I agree” prior to accessing the software services and had completed such transactions on numerous occasions over the three years it had utilized Timberline’s software.²⁵⁰

Just as important, however, was the court’s determination that Mortenson’s purchase order failed as an integrated contract based on the absence of an integration clause and lack of certain explicit terms.²⁵¹ The court pointed out that the purchase order set an hourly rate for software support, but the purchase order failed to specify how many hours of support were included.²⁵² Similarly, the purchase order established that the software would be updated, but the pricing for such upgrades was to be determined later.²⁵³ Moreover, the court asserted that the “presence of an integration clause [in a contract] strongly supports a conclusion that the parties’ agreement was fully integrated.”²⁵⁴

Accordingly, the court found that because no such clause was contained in Mortenson’s purchase order and because the contract was lacking in certain critical terms, the logical conclusion was that the contract was not intended as the complete and final agreement between the parties.²⁵⁵ The court determined, therefore, that the existence of the prior purchase order did not invalidate the subsequent clickwrap terms.²⁵⁶ In fact, the terms of Timberline’s clickwrap agreement, according to the court, served to fill the gaps present in Mortenson’s purchase order.²⁵⁷ Consequently, the court held that when Mortenson clicked “I agree” and began utilizing the software, Mortenson explicitly assented to the terms of Timberline’s clickwrap agreement.²⁵⁸

250. *Id.*

251. *Id.* at 311.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 310–11.

258. *Id.* at 313–14; *see also* *i.LAN Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338–39 (D. Mass. 2002) (holding that the existence of a prior purchase order did not invalidate a subsequent clickwrap agreement). Clickwrap served to fill the gaps of any prior agreement and clickwrap can fill the gaps left behind by a prior contract. *i.LAN Sys., Inc.*, 183 F. Supp. 2d at 338–39. The court specifically noted that it would be absurd to let a purchase order with silent terms govern. *Id.*

C. Notes of Caution While Reinforcing the Validity of Clickwrap

Considering the holdings in *Mortenson Co.* and *Morgan Laboratories, Inc.*, a word of warning is appropriate. When the possibility for a subsequent clickwrap contract is present, counsel, contract officers, and purchasing officials must all be aware of the impact their contract formation, specifically their contract provisions, may have on the enforceability of the clickwrap agreement. In fact, it seems advisable in such circumstances to specifically reject a party's clickwrap agreement within the integration clause of a contract.

Nonetheless, the holdings above reinforce the validity of clickwrap as a method of contracting. If the enforceability of clickwrap terms can be questioned, much less upheld when a prior agreement exists, then it stands to reason that clickwrap can certainly be deemed enforceable under normal contractual circumstances.

CONCLUSION

A preliminary review of clickwrap court decisions could lead one to assume that a great deal of uncertainty and discrepancy exists in this area of the law. Upon further analysis, however, it becomes clear that such discrepancies are based more on interpretation of facts than differences in legal reasoning. Although the final judgments of the various courts may seem disparate, the courts have applied basic contract law in determining the enforceability of clickwrap agreements, and their legal reasoning has been consistent.²⁵⁹

Basic contract law doctrines require a manifestation of agreement between the parties.²⁶⁰ Such manifestation of assent cannot occur unless there exists a prior opportunity to review and reject the terms of the agreement.²⁶¹ Additionally, a party must be given reasonable notice of such terms prior to securing the related products or services.²⁶² In all the clickwrap cases reviewed above, the courts consistently applied these standard principles of contract law. As the Court of Appeals for the Second Circuit pointed out, “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to

259. Casamiquela, *supra* note 3, at 495; Condon, *supra* note 5, at 454.

260. Hatch v. Oil Co., 100 U.S. 124, 133 (1879); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29, 31 (2d Cir. 2002); RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1981).

261. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996); Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000); *Mortenson Co.*, 998 P.2d at 312–13.

262. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429–31 (2d Cir. 2004).

those terms are essential” to maintain the integrity of electronic transactions.²⁶³

Similarly, courts have applied basic contract law in approaching questions of “adhesion” inherent in clickwrap agreements. To hold a contract of adhesion unenforceable, it must be shown that the contract was both procedurally and substantively unconscionable.²⁶⁴ Again, courts have been consistent in their application of this doctrine when reviewing clickwrap disputes. Although a clickwrap agreement, in the absence of reasonable competition, may meet the criteria of procedural unconscionability, a showing of substantive unconscionability is still required to find the agreement unenforceable.²⁶⁵ As a result, courts have found clickwrap agreements unenforceable on this basis in only a limited number of circumstances.²⁶⁶

Unless a clickwrap agreement is specifically precluded by the existence of a previous contract, the clickwrap agreement will be upheld if its terms are not found unconscionable and the agreement is otherwise compliant with standard contractual requirements. As the Court of Appeals for the Seventh Circuit explicitly phrased it, a clickwrap agreement will be held “enforceable unless [its] terms are objectionable on grounds applicable to contracts in general.”²⁶⁷ In other words, counsel, purchasers, and contract officers should be aware that objections to clickwrap are no different than objections to any other forms of contracting. In establishing this principle, the courts have been clear and their legal reasoning consistent.

263. *Specht*, 306 F.3d at 35.

264. *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998).

265. *See Comb*, 218 F. Supp. 2d at 1172; *Brower*, 676 N.Y.S.2d at 573.

266. *Mortenson Co.*, 998 P.2d at 316; *see Condon*, *supra* note 5, at 455.

267. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).