

Cross-Jurisdictional Variation in Internet Contract Regulation

Is There a Viable Path to Globally Uniform Internet Contracting Laws?

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Abstract: The internet has become a pervasive and established part of modern life and along with it legal frameworks for establishment and enforcement of consumer contracts have and continue to develop. Regulation and enforcement of internet contracts varies geographically. Generally, there are two primary legal approaches to internet contract enforcement: The United States model that relies on basic notice requirements to establish and enforce terms; and the European Union model that focuses on fundamental fairness in transactions between businesses and consumers. This paper examines common issues surrounding internet contracts and their application. The differences in the United States and European Union philosophy and approach to internet contracts are illustrated and compared. Finally, the potential for development of a unified legal framework for internet contracts is considered.

1. Introduction

The internet has become a pervasive and established part of modern life. People use the internet for instant communication, electronic mail, obtaining the news, investing, banking, forming social networks, finding romance, and even learning the law through a Virtual Learning Environment. Yet, while the internet itself – the network and technical communication protocols that make it all possible – is based on public standards,¹ and as such functions as an electronic commons, the services that make the internet valuable are provided by private parties – each of whom seeks to deal under its own terms.

Today, it has become commonplace for most websites and internet services to publish their own terms and condition for viewing content or maintaining an account. Few consumers read these terms and conditions. Yet, these terms and conditions can be contractually binding. As such, internet contracts are formed between parties across geographic and jurisdictional boundaries.

To date, different jurisdictions have established their own laws and regulations regarding internet contracts. The two primary nexus of legal development have been the United States – where the law has developed through litigation and favours freedom of contract – and the European Union – where the law has developed through regulation and favours consumer protection. Of course, as the reach of the internet, and the relationships it fosters, flow seamlessly across jurisdictional boundaries, the prospect compels examination of the viability of a unified approach to regulation of internet contracts.

This paper examines common issues surrounding internet contracts and their application. The difference in the United States and European Union philosophy and approach to internet contracts is illustrated and compared. Finally, the potential for development of a unified legal framework for internet contracts is considered.

¹ The internet is the outgrowth of ARPANET, a US military program initiated in 1969 to create a resilient and dispersed network of computers. See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

2. What are internet contracts?

The internet provides the ability for people and organizations around the globe to communicate and engage in transactions where, typically, “there is not enough at issue to justify protracted negotiations.”² As such, websites on the internet seek to establish the terms of the transactions in which they engage through unilateral contracts; these can include, for example, terms of service and end-user software licenses.³

2.1 Terminology of internet contracts

The development of the internet has created new terms for contracts, depending on how and when assent to the unilateral contract is manifested by the consumer. These terms include shrink-wrap, click-wrap and browser-wrap.⁴

2.1.1 Shrink-wrap agreements

In a seminal case that upheld the validity of such agreements in the United States, Judge Frank Easterbrook⁵ explained: “The ‘shrink-wrap license’ gets its name from the fact that retail software packages are covered in plastic or cellophane ‘shrink-wrap,’ and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package.”⁶ Under this scheme, the consumer is not aware of all of the terms at the time of purchase; however, the decision to keep the product after receiving notice of the unilateral terms is held to constitute assent.⁷

2.1.2 Click-wrap agreements

In contrast to the shrink-wrap approach, ‘click-wrap’ refers to a scheme whereby the consumer is shown the terms and is required to manifest assent by clicking on a button or link that states ‘I agree.’⁸ This approach is typical with service providers that require establishment of an account.

2.1.3 Browse-wrap agreements

Under the browse-wrap scheme, terms of service are located somewhere on a website, and the consumer’s use of the website services is construed as assent to a unilateral contract.⁹ For example, a consumer that uses the Google™ website is considered by the firm to have bound themselves to certain contractual terms which can be found by navigating two links away from the home page.¹⁰ The terms of service state:

Your use of Google’s products, software, services and web sites (referred to collectively as the “Services” . . .) is subject to the terms of a legal agreement between you and Google. . . . In order to use the Services, you must first agree to the Terms. You may not use the Services if you do not accept the Terms.¹¹

² Ian C. Ballon, *E-Commerce and Internet Law: Treatise with Forms*, 2d Ed (West 2010), Ch 14.02.

³ *Id.*

⁴ Gregory E. Maggs, *Regulating Electronic Commerce*, 50 Am. J. Comp. L. 665, 670 (Fall 2002).

⁵ Now Chief Judge of the United States Court of Appeals for the Seventh Circuit and professor of law at the University of Chicago. Biographical Directory of Federal Judges, *available at* <http://www.fjc.gov/servlet/nGetInfo?jid=678> (last visited Apr. 3, 2011).

⁶ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

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

⁸ Margaret J. Radin, *Humans, Computers, and Binding Commitment*, 75 Ind. L.J. 1125, 1134 (Fall 2000).

⁹ Woodrow Hartzog, *The New Price To Play: Are Passive Online Media Users Bound By Terms Of Use?*, 15 Comm. L. & Pol’y 405, 406 (Fall 2010).

¹⁰ *See* Google Terms of Service, *available at* <http://www.google.com/accounts/TOS> (last visited Apr. 4, 2011).

¹¹ *Id.* at sections 1.1 and 2.1.

Lest the consumer be inclined to take the matter of the legal agreement lightly, the firm suggests: “Before you continue, you should print off or save a local copy of the Universal Terms for your records.”¹²

2.2 But does anyone actually read the agreements?

It is unclear how many Google™ users have actually read and printed off the ‘legal agreement.’ However, studies suggest that very few, if any, consumers actually read such terms.

Anecdotal evidence is available from a demonstration by GameStation, a UK company. On April 1, 2010, GameStation required consumers seeking to complete a purchase to review and affirmatively accept, among its standard terms, an ‘Immortal Soul Clause;’¹³ consumers who read the agreement would notice an opportunity to opt out of the obligation to relinquish their immortal soul, and obtain a £5 GBP gift voucher in the process.¹⁴ The firm reported that only 12% of clients who consummated a purchase opted to save their souls and collect £5.¹⁵

Published studies paint an even bleaker picture. A 2006 survey of Cornell Law School students found that only four percent *claimed* to read such agreements in conjunction with purchasing products online.¹⁶ A study of the actual internet browsing behaviour of 45,091 households found that “only about 0.1 or 0.2 percent access a product’s [agreement] for at least one second.”¹⁷

2.3 What do they write when we are not reading?

Though a contract for a human soul has fetched about \$400 on the internet,¹⁸ the market and commercial value for souls is still limited and undeveloped.¹⁹ Thus, with the exception of the 7500 who did,²⁰ most internet consumers can probably rest assured that they have not ‘agreed’ to sell their immortal soul to an internet company. In general, companies seek, and are advised to, minimize their potential liability from internet operations.²¹ Suggested terms include:

- Exculpatory clauses that require waivers of liability from “any incidental or consequential damages, including lost revenues, lost profits, or lost economic advantage of any sort.”²²
- Disclaimer of warranties for the product or service provided.²³

¹² *Id.* at section 2.4.

¹³ “By placing an order via this web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk or one of its duly authorised minions. We reserve the right to serve such notice in 6 (six) foot high letters of fire, however we can accept no liability for any loss or damage caused by such an act. If you a) do not believe you have an immortal soul, b) have already given it to another party, or c) do not wish to grant Us such a license, please click the link below to nullify this sub-clause and proceed with your transaction.” As reported by: Marc Perton, *Read Fine Print Or GameStation May Own Your Soul*, consumerist.com, (April 16, 2010).

¹⁴ Marc Perton, *Read Fine Print or GameStation May Own Your Soul*, consumerist.com, (April 16, 2010), available at: <http://consumerist.com/2010/04/read-fine-print-or-gamestation-may-own-your-soul.html> (last visited Apr. 4, 2011).

¹⁵ *Id.*

¹⁶ Robert Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in *Is Consumer Protection an Anachronism in the Information Economy?* (Jane K. Winn, Ed. 2006).

¹⁷ Bakos, Marotta-Wurgler and Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, available at: http://www.netinst.org/Bakos_Marotta-Wurgler_Trossen_09-04.pdf (last visited Apr. 4, 2010).

¹⁸ *EBay blocks man's attempt to sell soul*, USA Today (Feb. 6, 2002), available at: <http://www.usatoday.com/tech/news/2001-02-09-ebay-soul.htm> (last visited Apr. 5, 2011).

¹⁹ See Soul-Mart (<http://www.soul-mart.com/>); WonderClub list of souls available for sale (http://www.wonderclub.com/soul/view_users.php).

²⁰ Marc Perton, *Read Fine Print or GameStation May Own Your Soul*, consumerist.com, (April 16, 2010).

²¹ See, e.g., George B. Delta and Jeffrey H. Matsuura, *Law of the Internet* (Aspen Publishers, 2011), Appendix 14: Minimizing Potential Liability from Internet Operations.

²² *Id.* at para 3.

²³ *Id.*

- Jurisdiction (choice of forum) clauses that would allow the company to transfer disputes to a court of the company's choosing, along with waiver of "any defences based on venue, the inconvenience of the forum, the lack of personal jurisdiction, and the adequacy of service of process."²⁴
- Mandatory arbitration clauses, by which the consumer gives up the rights to sue the company in a court of law, to the ability to form a class action, to a public hearing, to a trial by jury and the right to appeal.²⁵
- Clauses that give away various license rights to content that the consumer generates.²⁶
- Agreement to a 'privacy policy' that allows the company to collect, use and share information about the consumer with third parties.²⁷
- Indemnification clauses that would cause the consumer to pay for the legal defines of the company should the company be sued by a third party as a result of the consumer's activity.²⁸

Actual terms often go beyond the suggested norm. Another common clause allows the company to change the terms of the contract at any time without notice.²⁹ Some terms allow companies to collect consumer information beyond internet activity; for example, Apple Inc.'s terms allow the firm and its affiliates to "collect, use, and share precise location data, including the real-time geographic location of your Apple computer or device."³⁰

The literal application of such terms, along with the global reach of the internet, produces interesting outcomes. Take, for example, the oddity created by the British Monarchy joining FacebookTM:³¹

By creating or administering a page on Facebook, the British Monarchy has apparently entered into an agreement³² with Facebook Ireland Limited³³ to, among other things, "submit to the personal jurisdiction of the courts located in Santa Clara County, California"³⁴ for settling any disputes with Facebook. So, while under the laws of the United Kingdom no civil or criminal proceeding could be brought against Her Majesty Queen Elizabeth II, herself being the Sovereign and the Fount of Justice,³⁵ could she have submitted herself to the laws and jurisdiction of the courts of Santa Clara County, California, to adjudicate disputes with a corporation chartered in a former province of the British Empire? If so, such an agreement may be of diplomatic and constitutional importance in the United Kingdom.

3. Are internet contracts enforceable?

In principle, there is no difference at law between a contract formed in person and one formed on the internet.³⁶ At the most basic level, what is required is an offer and an acceptance.³⁷ The question of whether the consumer's explicit or implicit conduct demonstrates assent and the intention to form an

²⁴ *Id.* at para 5.

²⁵ *Id.* at para 6.

²⁶ Gregory C. Smith, *Start-Up and Emerging Companies* (American Lawyer Media, 2011), Chapter 26. Legal Issues Associated with Creating and Operating Web Sites, para. g.

²⁷ *Id.* at para d.

²⁸ *Id.* at para g.

²⁹ See, e.g., Google Terms of Service, para. 19.2, available at: <http://www.google.com/accounts/TOS>

³⁰ Privacy Policy, Apple Inc., available at: <http://www.apple.com/privacy/> (last visited Apr. 24, 2011); Indeed, it was recently discovered that the firm's popular iPhone product has been collecting the movement and location of consumers without their knowledge. See Christopher Williams, *Apple iPhone tracks users' location in hidden file*, The Telegraph (Apr. 20, 2011), available at: <http://www.telegraph.co.uk/technology/apple/8464122/Apples-iPhone-tracks-users-location-in-hidden-file.html> (last visited Apr. 24, 2011).

³¹ Queen to launch British Monarchy page on Facebook, BBC News UK (Nov. 7, 2010), available at: <http://www.bbc.co.uk/news/uk-11704599> (last visited Apr. 5, 2011).

³² Statement of Rights and Responsibilities, Facebook, section 12. Available at: <http://www.facebook.com/terms.php> (last visited Apr. 5, 2011).

³³ *Id.* at section 18.1.

³⁴ *Id.* at section 15.1.

³⁵ See The Queen as Fount of Justice, available at

<http://www.royal.gov.uk/MonarchUK/Queenandthelaw/SovereignasFountofJustice.aspx> (last visited Apr. 5, 2011).

³⁶ Ian C. Ballon, *Internet Terms of Use and Contract Formation*, 978 PLI/Pat 625, 628 (September 2009).

³⁷ *Id.*

agreement has been the subject of debate and litigation.³⁸ However, once a party manifests an intention³⁹ to accept the terms put forth by another, an agreement can be formed.

Beyond the assent of the consumer, whether the terms of the agreement are enforceable largely depends on regulations, consumer protection laws, and equitable considerations, such as the doctrine of unconscionability.⁴⁰ Thus, the regional variance in laws, regulations and procedure causes a dilemma. While the internet makes geographic and jurisdictional boundaries irrelevant for the purpose of exchanging information and service, the legal framework governing terms and enforceability of agreements are jurisdictionally dependant. Thus, Google and Facebook may present the same service and same terms to everyone around the globe, and consumers may 'agree', but applicability and enforcement of the terms will vary depending on the location.

3.1 A cautionary tale

Feldman v. Google (2007)⁴¹ provides a clear illustration of why unread internet contract terms matter and how terms that would not be enforceable in the European Union are readily enforced in the United States. Lawrence Feldman, an attorney with a solo practice in Elkins Park, Pennsylvania, had signed up to advertise his services through Google's AdWords program.⁴² This "pay per click" program presented an advertisement to users of Google who searched for specific terms and charged Feldman when the users clicked on his advertisement.⁴³ Feldman allegedly became a victim of click fraud.⁴⁴

Click fraud occurs when entities or persons, such as competitors or pranksters, without any interest in Plaintiff's services, click repeatedly on Plaintiff's ad, the result of which drives up his advertising cost and discourages him from advertising.⁴⁵

Google's charges to Feldman exceeded \$100,000.⁴⁶ Feldman brought suit in the Common Pleas Court of Philadelphia County, alleging that click fraud can be tracked and prevented by computer programs, and that Google was negligent in failing to prevent and in not adequately warning him or investigating his complaints about click fraud.⁴⁷ Feldman sought "disgorgement of any profits [Google] obtained as a result of any unlawful conduct, and restitution of money [Feldman had] paid for fraudulent clicks."⁴⁸

Google successfully removed the matter to the federal court for Eastern District of Pennsylvania, and in the instant forum sought dismissal of the action, or in the alternative, transfer to the Northern District of California, located in Santa Clara County, California pursuant to the terms of its click-wrap agreement.⁴⁹ Feldman argued that the online agreement was not a valid contract, that he did not have notice and did not assent to the terms.⁵⁰ However, the court found the contract to be binding and that "failure to read an enforceable click-wrap agreement, as with any binding contract, will not excuse compliance with its terms."⁵¹ "A reasonably prudent internet user would have known of the existence of

³⁸ *Id.*

³⁹ It is important to note that while a signature can be used to evidence to show an intention to be bound, it is not required to form a contract. Regardless, both the European Union and the United States have enacted legislation to give full legal effect to 'electronic signatures.' See Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures; Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 96; see also see, Dennis Campbell, *E-Commerce and the Law of Digital Signatures*, (Oceana Publications, Inc, 2005).

⁴⁰ Nicola Lucchi, *The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society*, 15 INTJLIT 192 (Summer 2007).

⁴¹ *Feldman v. Google, Inc.*, 513 F.Supp.2d 229 (E.D.Pa., 2007).

⁴² *Id.* at 232.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 233.

⁴⁸ *Id.* at 232.

⁴⁹ *Id.* at 233.

⁵⁰ *Id.* at 235.

⁵¹ *Id.* at 236.

terms. . . Plaintiff's failure to read the Agreement, if that were the case, does not excuse him from being bound by his express agreement."⁵²

Feldman argued that transfer of the case to the federal court in Santa Clara (2914 mi / 4689 km away from his home jurisdiction)⁵³ would be tantamount to denying him access to the court. Feldman also argued that other provisions of the Google agreement were unconscionable, including provisions that:

- Disclaim all warranties, including "merchantability and fitness for any purpose."⁵⁴
- Exempt Google from any liability "for any consequential, special, indirect, exemplary, punitive, or other damages whether in contract, tort or any other legal theory, even if advised of the possibility of such damages."⁵⁵
- Shorten the statute of limitations for disputing charges to sixty days.⁵⁶

The court rejected Feldman's arguments, upheld the agreement, and transferred the case to the federal court located in Santa Clara County.⁵⁷ The case was never heard by the court in California as Feldman settled the matter.⁵⁸ This was likely a wise move; the finding that the click-wrap agreement, along with provisions regarding warranty and liability, was enforceable would likely make a trial moot.

This case was presided over by Judge James Giles⁵⁹, educated at Yale Law School, former attorney for the National Labor Relations Board, and appointed by President Carter to a life-time appointment as a federal judge. According to Westlaw Judicial Reports, in the last five years, of 82 appeals of his decisions, only two were reversed and two were reversed in part. This suggests that such treatment of internet contracts by United States federal courts is neither unusual nor uncharacteristic. This outcome would be unlikely in the European Union.

4. To litigate or to regulate, that is the question

Consumers and internet businesses face significantly different laws and enforcement procedures across the Atlantic.⁶⁰ Unique among other jurisdictions, the United States follows a market-oriented approach that shifts costs and risks to the consumer; while the European Union, along with many other jurisdictions, has developed a regulatory regime to protect consumers from risk.⁶¹ Other jurisdictions that follow a consumer oriented regulatory model similar to that of the European Union include Australia,⁶² Canada,⁶³ Japan,⁶⁴ New Zealand,⁶⁵ and Singapore.⁶⁶

⁵² *Id.* at 238.

⁵³ As computed to be the shortest distance by Google Maps™.

⁵⁴ *Id.* at 242.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 249.

⁵⁸ Confirmed by e-mail correspondence with Lawrence Feldman on Apr 6, 2011. On record with author.

⁵⁹ Official judicial profile, available at: <http://www.fjc.gov/servlet/nGetInfo?jid=857> (last visited Apr. 5, 2010)

⁶⁰ Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175 (2006).

⁶¹ See Ragnar E. Lofstedt & David Vogel, *The Changing Character of Regulation: A Comparison of Europe and the United States*, 21 RISK ANALYSIS 399 (2001).

⁶² See, Australian Competition & Consumer Commission, *Legislation*, available at <http://www.accc.gov.au/content/index.phtml/itemId/3653> (last visited Apr 7, 2011).

⁶³ See Industry Canada, *Internet Sales Contract Harmonization Template (2001)*, available at [http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/Sales_Template.pdf/\\$FILE/Sales_Template.pdf](http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/Sales_Template.pdf/$FILE/Sales_Template.pdf) (last visited Apr 6, 2011)

⁶⁴ See Antonios Karaikos, *Regulation of Unfair Contract Terms in Japan*, Waseda bulletin of comparative law (28), 13-44, 2010-03-01 (Outlining the influence of EU regulations on development of Japanese legislation); Quality-of-Life Policy Bureau, *Consumer Policy Regime in Japan*, available at <http://www.consumer.go.jp/english/cprj/index.html> (last visited Apr 7, 2011) (Noting that "The [Consumer Contract] Act includes a rule to enable consumers to cancel contracts when they misunderstand or are confused about certain activities by business enterprises and a rule to enable consumers to nullify all or part of provisions of contracts that unfairly impair the interests of consumers.").

In the United States, both dispute resolution and legal development has relied predominately on litigation. Within this context, the most litigated issues have generally revolved around procedurally oriented contract terms used by internet companies to limit consumer access to the courts and judicial process – such as terms requiring binding arbitration, limiting forum selection, and waiving class action rights.⁶⁷

In contrast, the Council of the European Union Directive on unfair terms in consumer contracts,⁶⁸ and its implementation in Member States, has eviscerated some of the terms commonly used in the United States by directing that they not be binding on consumers.⁶⁹ For example, the Directive prohibits terms aimed at:

- “Excluding or hindering the consumer’s right to take legal action; restricting the evidence available or imposing a burden of proof.”⁷⁰
- “Irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted.”⁷¹
- “Unilateral alteration of the terms of the contract.”⁷²
- Choice of law provisions that would apply to deny the consumer protections granted by the Directive.⁷³

Perhaps more importantly, the Directive requires Member States to ensure that “adequate and effective means exist to prevent the continued use of unfair terms”⁷⁴ and that “persons or organizations, having a legitimate interest under national law in protecting consumers, may take action . . . before the courts.”⁷⁵ As such, individual consumers are not necessarily required to file actions or join in a class, but rather, consumer groups can move on their behalf and seek legal remedies “directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.”⁷⁶ Meanwhile, agencies such as the United Kingdom’s Office of Fair Trading⁷⁷ can enforce and prosecute, but also provide guidance to businesses on how to comply with consumer protection laws.⁷⁸

4.1 Internet contract law in the United States

In describing the state of internet law in the United States, Professor Mark Lemley⁷⁹ wrote in 2006:

⁶⁵ See Consumer Guarantees Act 1993, Part 4, Supply of services, available at <http://www.legislation.govt.nz/act/public/1993/0091/latest/DLM311053.html> (last visited Apr 7, 2011); Ministry of Consumer Affairs, Consumer Law Reform Additional Paper – Unfair Contract Terms (September 2010), available at <http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/CLR-Additional-paper---Unfair-contract-terms.pdf> (last visited Apr 7, 2011); Ministry of Consumer Affairs, *New Zealand Model Code for Consumer Protection in Electronic Commerce* (October 2000), available at http://www.consumeraffairs.govt.nz/pdf-library/publications/model_code_e_commerce.pdf (last visited Apr 7, 2011).

⁶⁶ See Unfair Contract Terms Act, (Chapter 396) (1994), available at <http://statutes.agc.gov.sg/> (last visited Apr 7, 2010).

⁶⁷ See Wayne Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Section 211(3)*, 82 Wash. L. Rev. 227 (2007).

⁶⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT> (last visited Apr 7, 2011).

⁶⁹ *Id.* at Article 6.1

⁷⁰ *Id.* at ANNEX No 1q

⁷¹ *Id.* at ANNEX No 1i

⁷² *Id.* at ANNEX No 1j

⁷³ *Id.* at Article 6.2

⁷⁴ *Id.* at Article 7.1

⁷⁵ *Id.* at Article 7.2

⁷⁶ *Id.* at Article 7.3

⁷⁷ Office of Fair Trading (“OFT”) is a government agency charged with “making sure markets work well for consumers.” OFT—About the Office of Fair Trading, available at <http://www.oft.gov.uk/About/default.htm> (last visited Apr 4, 2011).

⁷⁸ See Office of Fair Trading, *Unfair contract terms guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* (September 2008), available at http://www.oft.gov.uk/shared_oftr/reports/unfair_contract_terms/oft311.pdf (last visited Apr 7, 2011).

⁷⁹ Professor of Law at Stanford Law School and Director, Stanford Program in Law, Science & Technology. Profile available at <http://www.law.stanford.edu/directory/profile/38/> (last visited Apr 8, 2011).

Ten years ago, courts required affirmative evidence of agreement to form a contract. No court had enforced a “shrink-wrap” license, much less treated a unilateral statement of preferences as a binding agreement. Today, by contrast, more and more courts and commentators seem willing to accept the idea that if a business writes a document and calls it a contract, courts will enforce it as a contract even if no one agrees to it. Every court to consider the issue has found “clickwrap” licenses, in which an online user clicks “I agree” to standard form terms, enforceable.⁸⁰

4.1.1 How the law developed

The seminal event in the development of United States jurisprudence was Judge Easterbrook’s⁸¹ decision in *ProCD, Inc. v. Zeidenberg* (1996).⁸² In *ProCD*,⁸³ the company had sold a phone database in a box that included terms of the license inside.⁸⁴ Judge Easterbrook held that the terms included in the box, even though unseen at the time of purchase, were enforceable because Zeidenberg knew they were there and could return the product if he did not like the terms; keeping the product constituted assent to the unilateral terms.⁸⁵ “A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened.”⁸⁶ Judge Easterbrook noted that the state can forbid the use of standard contracts, but defended the use of standard contracts as “essential to a system of mass production and distribution.”⁸⁷

A year later, Judge Easterbrook followed *ProCD* with a decision that upheld a binding arbitration clause⁸⁸ included in the standard terms. *Hill v. Gateway 2000* (1997)⁸⁹ was a class action by consumers who had purchased computers by telephone; the computers arrived in boxes containing a form contract that required arbitration of all disputes.⁹⁰ The trial court had invalidated the arbitration clause for lack of notice.⁹¹ On appeal, following the rationale in *ProCD*, Judge Easterbrook held that both the contract and the arbitration terms were enforceable. The decision was noteworthy in that it held consumers to the same standard applied to the merchant plaintiff in *ProCD*, and also in that it justified the policy on economic grounds. In addressing this, Judge Easterbrook writes: “Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.”⁹²

By the late 1990’s, court decisions enforcing internet terms of service began to appear. In *Hotmail Corp. v. Van\$ Money Pie Inc.* (1998),⁹³ the court issued an injunction against users for violating

⁸⁰ Mark A. Lemley, *Terms Of Use*, 91 Minn. L. Rev. 459, 459 (December 2006).

⁸¹ Chief Judge of the United States Court of Appeals for the Seventh Circuit, one of the most cited appellate judges in the United States, a proponent of use of economic principles in law.
http://en.wikipedia.org/wiki/Frank_H._Easterbrook (last visited Apr 8, 2011).

⁸² Mark A. Lemley, *Terms Of Use*, 91 Minn. L. Rev. 459, 468 (December 2006).

⁸³ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir, 1996).

⁸⁴ *Id.* at 1450.

⁸⁵ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir, 1996).

⁸⁶ *Id.* at 1452.

⁸⁷ *Id.* at 1451.

⁸⁸ Mandatory arbitration clauses take away the right of a consumer to bring a lawsuit in courts of law; they require that disputes be arbitrated by a private organization. The arbitration is often much more costly to the consumer, the decisions are often confidential and do not result in development of precedent. While in the European Union these terms are automatically considered unfair and nonbinding (*See also* Section 91 of the Arbitration Act (UK) of 1996 and Unfair Arbitration Agreements (Specified Amount) Order 1999), in the United States these terms are encouraged. In 1925, the United States Congress passed the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16 (2010), requiring that courts enforce arbitration clauses as they would any other contract term. As such, the FAA established a “liberal federal policy favoring arbitration.” *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As discussed later in this paper, the FAA, and its very recent interpretation by the United States Supreme Court is likely to provide an interesting challenge to internet companies which will find the use of mandatory arbitration valuable in the United States and illegal in the European Union.

⁸⁹ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir, 1997).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1149.

⁹³ *Hotmail Corp. v. Van\$ Money Pie Inc.*, 1998 WL 388389, 6 (N.D.Cal., 1998).

Hotmail's terms of service by using the accounts to send spam.⁹⁴ In *Caspi v. Microsoft Network* (1999),⁹⁵ the New Jersey court of appeal upheld Microsoft's choice of forum clause because the users manifested consent by clicking the 'I agree' button during registration. The court stated: "Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contracts as a whole."⁹⁶

In the United States, the issue of enforceability often turns on proper notice and the act by which it is claimed that the consumer manifested assent. In *Specht v. Netscape Communications Corp.* (2002),⁹⁷ a class of consumers brought suit against Netscape alleging that the firm's program invaded their privacy by transmitting their internet behavior and personal information to Netscape.⁹⁸ The firm contended that, by downloading the software, the consumers had agreed to the terms of its license and were bound by mandatory arbitration terms. The firm contended that it gave sufficient notice of the terms by providing the following notice next to the download button: "Please review and agree to the terms . . . before downloading and using the software."⁹⁹ In an opinion authored by Justice Sotomayor,¹⁰⁰ the court of appeals addressed "issues of contract formation in cyberspace,"¹⁰¹ considered decisions of *ProCD* and *Hill*, and held that the simple act of downloading is not enough to show assent. "Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."¹⁰² In short, the consumer should be shown the agreement and required to click 'I agree.'

Yet, the same court clarified in *Register.com, Inc. v. Verio, Inc.* (2004), "contract offers on the Internet often require the offeree to click on an 'I agree' icon. And no doubt, in many circumstances, [this] is essential to the formation of a contract. But not in all circumstances."¹⁰³ When the consumer "makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms."¹⁰⁴ Thus, when the consumer has knowledge that the terms exist, they can be binding even if he has not manifested assent by clicking on a button marked 'I agree.'

4.1.2 The turning tide in State courts

More recently, courts have relied on State consumer protection statutes to invalidate specific terms in internet contracts, particularly with those relating to arbitration and choice of forum.¹⁰⁵ The move for reform has come from State courts, notably from California, where the law relative to unconscionability gives greater flexibility to judges to reform contracts for reasons of equity, fairness or public policy.¹⁰⁶

In California, legislation provides the courts with authority to refuse enforcement of any contract term that is found "to have been unconscionable at the time it was made,"¹⁰⁷ and further requires that claimants "shall be afforded a reasonable opportunity to present evidence" to the courts to show that a contract or a clause is unconscionable.¹⁰⁸ To determine if a contract term is unconscionable, California courts conduct a two-step analysis and require the term to be both procedurally and substantially unconscionable, "the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly

⁹⁴ Unsolicited commercial e-mail. Black's Law Dictionary (9th ed. 2009).

⁹⁵ *Caspi v. Microsoft Network, L.L.C.*, 323 N.J.Super. 118 (N.J.Super.A.D., 1999).

⁹⁶ *Id.* at 126.

⁹⁷ *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2nd Cir, 2002).

⁹⁸ *Id.*

⁹⁹ *Id.* at 23.

¹⁰⁰ Justice Sonia Sotomayor was appointed to the United States Supreme Court by President Obama. Official profile available at <http://www.fjc.gov/servlet/nGetInfo?jid=2243> (last visited Apr 6, 2011).

¹⁰¹ *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 17 (2nd Cir, 2002).

¹⁰² *Id.* at 35.

¹⁰³ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2nd Cir, 2004).

¹⁰⁴ *Id.*

¹⁰⁵ See Jennifer Granick, *Courts Turn against Abusive Clickwrap Contracts*, Wired.com (Aug 1, 2007), available at http://www.wired.com/politics/law/commentary/circuitcourt/2007/08/circuitcourt_0801 (last visited Apr 4, 2011).

¹⁰⁶ Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 Cardozo L. Rev. 1475, 1489 – 92 (April 2010).

¹⁰⁷ Cal. Civ. Code § 1670.5(a).

¹⁰⁸ Cal. Civ. Code § 1670.5(b).

harsh’ or ‘one-sided’ results.”¹⁰⁹ The California courts have applied this analysis, along with policies embodied in the State’s consumer protection acts, to terms commonly found in internet contracts.

In *America Online, Inc. v. Superior Court* (2001), the California court of appeals refused to enforce America Online’s forum selection clause.¹¹⁰ In that case, the class action litigants had sought remedies under the California Consumers Legal Remedies Act (CLRA);¹¹¹ transfer and trial of the case to Virginia would have constituted “the functional equivalent of a contractual waiver of the consumer protections under the CLRA.”¹¹² The court found that doing so would diminish the rights of California residents and violate public policy.¹¹³

In *Discover Bank v. Superior Court* (2005),¹¹⁴ the Supreme Court of California found that unconscionability analysis was applicable to mandatory arbitration provisions – the very type of clause that was at issue in *ProCD*. In *Discover Bank*, the California Supreme Court was confronted with the task of balancing California’s policy favoring fairness in consumer contracts, with the federal policy favouring arbitration agreements as embodied in the Federal Arbitration Act (“FAA”).¹¹⁵ The FAA requires that a “written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹¹⁶ As such, the California Supreme Court found that in enforcing arbitration agreements, California courts are permitted to employ the same standards that they would to any other contract.¹¹⁷ If the terms of an arbitration agreement – such as the class action waiver at issue in the instant case – are found to be unconscionable, then enforcement of those terms or the entire contract can be denied in the same manner as any other contract; thus, state courts are not obligated by the FAA to “enforce contractual terms even if those terms are found to be unconscionable or contrary to public policy under general contract law principles.”¹¹⁸ The California Supreme Court clarified:

We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or wilful injury to the person or property of another.”¹¹⁹

On this basis, the court held that the arbitration agreement at issue was unconscionable. The *Discover Bank* principle decidedly brought internet contract under the purview of California’s unconscionability analysis.

In *Aral v. EarthLink, Inc.* (2005), the California Court of Appeals invalidated both class action waiver and forum selection clauses of EarthLink’s agreement as unconscionable.¹²⁰ The court derided the “focus on notice over reasonableness.”¹²¹ The court further clarified that when terms of agreement are presented to a consumer on a ‘take it or leave it’ basis, the process automatically meets the requirements of procedural unconscionability.¹²² As such, the term that required consumers to travel long distances to

¹⁰⁹ *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 114, (Cal.,2000).

¹¹⁰ *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1 (Cal. App. 1 Dist., 2001).

¹¹¹ Cal. Civ. Code §§ 1750 et seq.

¹¹² *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 5 (Cal. App. 1 Dist., 2001).

¹¹³ *Id.* at 12.

¹¹⁴ *Discover Bank v. Superior Court*, 36 Cal.4th 148 (Cal.,2005).

¹¹⁵ 9 U.S.C. §§ 1-16 (2010).

¹¹⁶ 9 U.S.C. § 2.

¹¹⁷ *Discover Bank v. Superior Court*, 36 Cal.4th 148, 165-166 (Cal.,2005).

¹¹⁸ *Id.* at 166.

¹¹⁹ *Id.* at 162-163.

¹²⁰ *Aral v. EarthLink, Inc.*, 134 Cal.App.4th 544 (Cal.App. 2 Dist., 2005).

¹²¹ *Id.* at 560.

¹²² *Id.* at 556 – 557.

collect small sums, on a case-by-case basis, was substantially unconscionable and unreasonable as a matter of law.¹²³

In *Gatton v. T-Mobile USA, Inc.* (2007), the California Court of Appeal invalidated arbitration clause contained in T-Mobile's agreement as unconscionable.¹²⁴ The court reiterated that "use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives."¹²⁵ Thus, with such contracts, California courts would move to analyse the degree of substantive unconscionability. After the California State Supreme Court denied a petition for review, T-Mobile, in a direct challenge of the principle set in *Discover Bank*, sought review with the United States Supreme Court, arguing that the Federal Arbitration Act ("FAA") precludes state courts from refusing to enforce private arbitration agreements regardless of the terms.¹²⁶ T-Mobile's petition for review of the California Court of Appeal decision by the United States Supreme Court was denied.¹²⁷

Beyond California, in *Dix v. ICT Group, Inc.* (2007), the Supreme Court of Washington State upheld an appellate court decision finding that a forum selection clause violated public policy.¹²⁸ A class of consumers had brought action against America Online, Inc. (AOL), and sought remedy under Washington State's Consumer Protection Act, alleging that the firm overcharged them.¹²⁹ Pursuant to its clickwrap agreement, AOL moved to dismiss the case, stating that the forum selection clause mandated that disputes be adjudicated in Virginia.¹³⁰ Acknowledging support for standardized contracts at the federal court level, the state court noted:

In general, a forum selection clause may be enforced even if it is in a standard form consumer contract not subject to negotiation. [Citing United States Supreme Court Authority] "[E]nforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability." Additionally, such clauses may reduce the costs of doing business, thus resulting in reduced prices to consumers.¹³¹

However, the court then quoted the United States Supreme Court in noting that such terms should be held unenforceable if they would operate to "contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."¹³² The Virginia forum presented greater obstacles in forming a class action suit, and thus violated the policy embodied in the State's Consumer Protection Act.¹³³

[P]ublic policy is violated when a citizen's ability to assert a private right of action is significantly impaired by a forum selection clause that precludes class actions in circumstances where it is otherwise economically unfeasible for individual consumers to bring their small-value claims.¹³⁴

It is important to note that these developments on the West Coast are not representative of the state of law in the remainder of the United States. New York State courts are much more formalistic in the approach to contract terms, and would likely not undertake such analysis.¹³⁵ Moreover, standards for unconscionability vary among the States; for example, in upholding enforceability of an arbitration term, the Supreme Court of South Carolina defined unconscionability "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that

¹²³ *Id.* at 561.

¹²⁴ *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571 (Cal.App. 1 Dist., 2007).

¹²⁵ *Id.* at 585.

¹²⁶ Petition for a Writ of Certiorari, *T-Mobile USA, Inc. v. Gatton*, 2008 WL 378892 (U.S., Feb. 7, 2008).

¹²⁷ *T-Mobile USA, Inc. v. Gatton*, 553 U.S. 1064 (U.S.2008).

¹²⁸ *Dix v. ICT Group, Inc.*, 160 Wash.2d 826 (Wash., 2007).

¹²⁹ Revised Code of Wash. chapter 19.86

¹³⁰ *Dix v. ICT Group, Inc.*, 160 Wash.2d 826 (Wash., 2007).

¹³¹ *Id.* at 835.

¹³² *Id.* at 836.

¹³³ *Id.*

¹³⁴ *Id.* at 840 – 841.

¹³⁵ See Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 Cardozo L. Rev. 1475 (April 2010).

no reasonable person would make them and no fair and honest person would accept them.”¹³⁶ Adopting the same definition, the Supreme Court of Alabama adds that “rescission of a contract for unconscionability is an extraordinary remedy usually reserved for the protection of the unsophisticated and uneducated.”¹³⁷ By these standards, the facts presented in the California State cases would clearly not have produced the same results in Alabama and South Carolina.

4.1.3 The tide breaks on the U.S. Supreme Court shores

With the California State courts leading the charge, issues of California law eventually found their way into the federal courts. In *Douglas v. U.S. Dist. Court for Cent. Dist. of California* (2007), the Ninth Circuit Court of Appeals considered “whether to enforce a modified contract with a customer where . . . the only notice of the changed terms consisted of posting the revised contract on the provider’s website.”¹³⁸ Talk America, Inc. had added new terms to its customer service contract, including an arbitration clause, a class action waiver and a choice of law provision. The district federal court found adequate notice to enforce the new terms and compelled arbitration.¹³⁹ On review, the court of appeals found that mere posting of new terms is not adequate notice, and further noted in obiter: “Even if Douglas were bound by the new terms of the contract (which he is not . . .), the new terms probably would not be enforceable in California because they conflict with California’s fundamental policy as to unconscionable contracts.”¹⁴⁰

California law set out in *Discover Bank* also found approval with the Ninth Circuit Court of Appeals in *Shroyer v. New Cingular Wireless Services, Inc.* (2007). As alleged in that case, after the merger of AT&T Wireless and Cingular, the company sought to prompt transition of clients from AT&T service plans to maximize profits. To do so, the firm degraded service quality and then informed complaining customers that “it could provide members with a ‘chip’ that would restore their service quality. To receive the chip, however, [they] would be required to extend their current contracts by entering into ‘Wireless Service Agreements’ (Agreements) with Cingular.”¹⁴¹ To enter into the new service agreement, customers were required to “select[] the answer ‘Yes’ in response to the statement ‘You agree to the terms as stated in the Wireless Service Agreement and terms of service.’”¹⁴² The terms of service incorporated a mandatory arbitration clause along with a class action waiver.¹⁴³ In applying California law, the Ninth Circuit Court of Appeals held: “Cingular’s class arbitration waiver is unconscionable under California law, and that refusing to enforce such a provision, as California courts would, is not expressly or impliedly pre-empted by the Federal Arbitration Act.”¹⁴⁴

In an ironic twist, a very similar issue came back before the Ninth Circuit after AT&T acquired Cingular and renamed it AT&T Mobility. In *Laster v. AT & T Mobility LLC* (2009), the firm sought to enforce its arbitration terms against consumers who complained that the firm charged them \$30 in ‘taxes’ for a ‘free’ phone.¹⁴⁵ While the specific terms of the arbitration provision was slightly different, the firm made the same arguments rejected in *Shroyer* – namely that allowing consumers to form class-actions “would hinder a speedy resolution, place extra burdens on the arbitral process, and lead to companies abandoning arbitration altogether.”¹⁴⁶ The firm failed on appeal but succeeded in its petition for certiorari with the United States Supreme Court.¹⁴⁷

In its decision rendered on April 27, 2011,¹⁴⁸ the United States Supreme Court reversed the Ninth Circuit decision and, in doing so also eviscerated the California Supreme Court’s decision in *Discover Bank* by holding that the FAA pre-empt state law and requires all courts to enforce arbitration clauses in

¹³⁶ *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 554 (S.C., 2004).

¹³⁷ *Sears Termite & Pest Control, Inc. v. Robinson*, 883 So.2d 153, 158 (Ala., 2003).

¹³⁸ *Douglas v. U.S. Dist. Court for Cent. Dist. of California*, 495 F.3d 1062, 1069 (9th Cir, 2007).

¹³⁹ *Id.* at 1065.

¹⁴⁰ *Id.* at 1067.

¹⁴¹ *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 979 (C.A.9,2007).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 993.

¹⁴⁵ *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 852 (C.A.9, 2009).

¹⁴⁶ *Id.* at 858.

¹⁴⁷ *AT & T Mobility LLC v. Concepcion*, 130 S.Ct. 3322 (2010)

¹⁴⁸ *AT&T Mobility LLC v. Concepcion*, 2011 WL 1561956 (U.S., April 27, 2011).

consumer contracts.¹⁴⁹ In the opinion penned by Justice Scalia, the majority provides that the States can address their concerns with contracts of adhesion by requiring better notice “for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted.”¹⁵⁰ Perhaps signalling general approval of adhesion contracts as a whole, the Supreme Court also states that “the times in which consumer contracts were anything other than adhesive are long past.”¹⁵¹

It is yet unclear how this ruling will affect the viability of State consumer protection laws and unfair contract laws, as it pertains only to the mandatory arbitration clauses. However, as parties are free to establish their own rules and terms of arbitration, and arbitration agreements are enforceable by their own terms, it would seem possible that any term, exclusion, or restriction can be bound under the umbrella of an arbitration clause or required terms of arbitration. Of course, this places the law of United States with respect to arbitration clauses in direct conflict with those of the European Union that automatically consider arbitration terms to be unfair and nonbinding.¹⁵²

4.1.4 Contrast to development of UK unfair contract law

The current state of the law in the United States relative to internet contracts, where some State courts have been using consumer protection laws and principles of unconscionability in the attempt to slowly change the formalistic approach of contract enforcement is somewhat similar to how the law developed in the United Kingdom.

Nearly thirty years ago, well before the world-wide-web or prevalent personal use of computers, Lord Denning MR, delivered the final judgment of his career in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983].¹⁵³ The case dealt with the sale of defective cabbage seeds under a form contract that limited liability to the cost of “seeds or plants sold.” To allow for consequential damages, the Court of Appeal held that the product was so defective that it could not have been “seeds,” and thus the standard form limitation did not apply. Lord Denning delivered a concurring opinion, the rationale of which was accepted by the House of Lords on review.¹⁵⁴ Lord Denning’s dissent is noteworthy in the context of the development of United States internet contract law:

The heyday of freedom of contract

None of you nowadays will remember the trouble we had - when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of “freedom of contract.” But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, “Take it or leave it.” The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, “You must put it in clear words,” the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.

It was a bleak winter for our law of contract. . . . Faced with this abuse of power - by the strong against the weak - by the use of the small print of the conditions - the judges did what they could to put a curb upon it. They still had before them the idol, “freedom of contract.” They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. . . . In short, whenever the wide words - in their natural meaning - would give rise to an unreasonable result,

¹⁴⁹ *Id.* at *13.

¹⁵⁰ *Id.* at *9, footnote 6.

¹⁵¹ *Id.* at *9.

¹⁵² See Section 91 of the Arbitration Act (UK) of 1996; Unfair Arbitration Agreements (Specified Amount) Order 1999.

¹⁵³ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] Q.B. 284.

¹⁵⁴ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803.

the judges either rejected them as repugnant to the main purpose of the contract, or else cut them down to size in order to produce a reasonable result.¹⁵⁵

Lord Denning called for judicial determination as to the *reasonableness* of standard contract terms and reliance on the Unfair Contract Terms Act 1977¹⁵⁶ to strike offending terms. In effect, the California State courts aimed for the same goal in applying state laws to invalidate terms on the basis of unconscionability – they were stabbing at the ‘freedom of contract’ idol. Of course, the courts in the United Kingdom operated in an environment where the Parliament enacted an unfair contract terms Act, and where the House of Lords upheld its application.

The courts in the United States exist in a different environment, one where Congress has established a policy favouring private arbitration and the United States Supreme Court has held that the FAA pre-empts state laws and requires arbitration provisions to be “enforced according to their terms.”¹⁵⁷ Of course, this national standard as to applicability of arbitration terms still leaves the States to regulate other terms. Whether they will continue the charge against contracts of adhesion remains to be seen.

One thing that is certain is that on the national level, the philosophy and direction of legal development between the United States and the European Union have been and are progressively divergent. The philosophical view point of the United States Supreme Court that adhesive consumer contracts are the modern norm of contracting is unlikely to be harmonized with that of the Council of European Union’s directive that adhesive contracts should be nonbinding.

4.2 Internet contract law in the European Union

In contrast to how internet law has developed in the United States through litigation, the European development has been through legislation. Prior to the Treaty on European Union, each member state had its own regulatory model. The Unfair Contract Terms Act, enacted in the United Kingdom in 1977, provides an example of a national law aimed at regulating terms used in standard contracts with consumers.¹⁵⁸ As one of the stated goals of the European Union was to “promote economic and social progress for their peoples . . . and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,”¹⁵⁹ the EU began a process of harmonizing consumer protection laws soon after the enactment of the Maastricht Treaty.¹⁶⁰

In 1993, the Directorate General for Health and Consumer Affairs developed a directive on unfair contract terms in consumer contracts.¹⁶¹ The Distance Selling Directive¹⁶² was issued in 1997 to regulate transactions completed remotely, including by internet and other electronic means. The Directive on Electronic Commerce¹⁶³ was issued in 2000 to promote accountability and transparency with regard to online transactions. Implementation of these directives by the Member States has developed the framework of internet law in the European Union.

¹⁵⁵ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] Q.B. 284.

¹⁵⁶ Unfair Contract Terms Act 1977, available at <http://www.legislation.gov.uk/ukpga/1977/50> (last visited Apr 8, 2011).

¹⁵⁷ *AT & T Mobility LLC v. Concepcion*, 2011 WL 1561956, 9 (U.S., 2011).

¹⁵⁸ Unfair Contract Terms Act 1977, available at <http://www.legislation.gov.uk/ukpga/1977/50> (last visited Apr 8, 2011).

¹⁵⁹ TREATY ON EUROPEAN UNION, Official Journal C 191, 29 July 1992, available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html> (last visited Apr 9, 2011).

¹⁶⁰ At the same time, the European Commission produced an initiative to create a coherent legal framework for electronic commerce by the year 2000. See A European Initiative in Electronic Commerce, COM(97)157, available at <http://cordis.europa.eu/esprit/src/ecomcom.htm> (last visited Apr 9, 2011).

¹⁶¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT> (last visited Apr 9, 2011).

¹⁶² Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. Official Journal L 144, 04/06/1997 P. 0019 – 0027, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML> (last visited Apr 9, 2011).

¹⁶³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, Official Journal L 178, 17/07/2000 P. 0001 – 0016, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML> (last visited Apr 9, 2011).

4.2.1 Local implementation

The Maastricht Treaty requires Member States to develop their national law to comply with the terms and the requirements of the directives; as such, once the national laws are enacted, the terms of the directive establish the minimum protections available to the individuals. In the interim, courts are required to interpret national laws in light of the directives.¹⁶⁴

The Unfair Contract Terms Directive, which applies to all consumer contracts whether online or offline, requires Member States to “ensure that contracts concluded with consumers do not contain unfair terms.”¹⁶⁵ Specifically relevant to internet contracts, the directive provides: “A contractual term which has not been individually negotiated shall be regarded as unfair if . . . it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”¹⁶⁶ In the United Kingdom, for example, the directive was first implemented by The Unfair Terms in Consumer Contracts Regulations 1994,¹⁶⁷ and then as amended by The Unfair Terms in Consumer Contracts Regulations 1999.¹⁶⁸ The Acts allow for direct enforcement action by the consumer and also empowers the Office of Fair Trading and other regulatory bodies to seek enforcement through the courts.¹⁶⁹

4.2.2 AOL France v UFC Que Choisir

Application of the European regulations relative to internet contracts is illustrated by the case brought forth by Union Federale des Consommateurs-Que Choisir (“UFC Que Choisir”)¹⁷⁰ against AOL France.¹⁷¹ The case illuminates both the European Union regulatory model and its enforcement mechanism.

La Commission Des Clauses Abusives, the French Unfair Contract Terms Commission,¹⁷² held public hearings to evaluate contract terms used by internet service providers in 2002. Based on the hearings, the commission published an advisory detailing its findings as to which of the commonly used clauses were deemed as unfair under the French implementation of the Unfair Contract Terms Directive.¹⁷³ The recommendations identified 28 clauses that the commission found to be unfair.¹⁷⁴

French law allows consumer groups to file representative actions – thus individual consumers are not required to sue.¹⁷⁵ Consequently, when AOL failed to comply with the recommendations of the commission, UFC Que Choisir brought suit against AOL, claiming that terms in AOL’s standard form agreement violated French Unfair Contract Terms law. Of the 36 contractual terms in dispute, the trial court found 31 of the terms to be either unfair or illegal.¹⁷⁶ The Court of Appeals in Versailles affirmed the trial court decision in full.¹⁷⁷

¹⁶⁴ See Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135.

¹⁶⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT> (last visited Apr 9, 2011).

¹⁶⁶ *Id.* at Article 3.1.

¹⁶⁷ The Unfair Terms in Consumer Contracts Regulations, 1994 No. 3159, available at <http://www.legislation.gov.uk/ukxi/1994/3159/contents/made> (last visited Apr 9, 2011).

¹⁶⁸ The Unfair Terms in Consumer Contracts Regulations, 1999 No. 2083, available at <http://www.legislation.gov.uk/ukxi/1999/2083/contents/made> (last visited Apr 9, 2011).

¹⁶⁹ See United Kingdom, Office of Fair Trading, *IT Consumer Contracts Made at a Distance – Guidance on Compliance with the Distance Selling and Unfair Terms in Consumer Contracts Regulation*, Publication no.672 (Dec. 2005), available at http://www.oft.gov.uk/shared_oftr/reports/consumer_protection/oft672.pdf (last visited Apr 9, 2011).

¹⁷⁰ See UFC Que Choisir website, available at <http://www.quechoisir.org/> (last visited Apr 9, 2011).

¹⁷¹ *AOL France v. UFC Que Choisir*, R.G. No 04/05564, Cour D’appel De Versailles, Arrêt du 15 septembre 2005, available at <http://www.clauses-abusives.fr/juris/cav050915.pdf> (last visited Apr 9, 2011).

¹⁷² More information about the La Commission des Clauses Abusives is available at <http://www.clauses-abusives.fr/> (last visited Apr 9, 2011).

¹⁷³ Recommandation n°03-01 relative aux contrats de fourniture d’accès à l’Internet (2003), available at <http://www.clauses-abusives.fr/recom/03r01.htm> (last visited Apr 9, 2011).

¹⁷⁴ *Id.*

¹⁷⁵ Actions Intentees Dans L’interet Collectif Des Consommateurs, available at http://lexinter.net/Legislation/actions_en_representation_conjointe.htm (last visited Apr 9, 2011).

¹⁷⁶ R.G. No 02/03156, Tribunal De Grande Instance De Nanterre, Jugement du 2 juin 2004, available at <http://www.clauses-abusives.fr/juris/tgin040602.pdf> (last visited Apr 9, 2010).

¹⁷⁷ *AOL France v. UFC Que Choisir*, R.G. No 04/05564, Cour D’appel De Versailles, Arrêt du 15 septembre 2005, available at <http://www.clauses-abusives.fr/juris/cav050915.pdf> (last visited Apr 9, 2011).

The positive aspect of this process for AOL was that the focus was on compliance, rather than the assessment and award of damages. The court awarded €30,000 in damages and costs to UFC Que Choiser, €1,500 in fees to the court, and ordered AOL to bring the offending terms into compliance with the law under the threat of €1,000 fine per day after one month.¹⁷⁸ It is a very small sum in comparison to damages commonly awarded in class action litigation in the United States, and certainly nominal in consideration of AOL's operations.

4.2.3 Better compliance and reduced litigation

Another noteworthy aspect of the combined advisory and regulatory process is that it can generate compliance before the consumer is harmed and without the expense of litigation. As an illustrative example, following the *AOL France v UFC Que Choisir* developments in France, the UK Office of Fair Trading ("OFT") published guidance for compliance with distance selling and unfair contract terms regulations specifically geared toward IT companies.¹⁷⁹ With the *AOL France* precedence showing that European courts will enforce such guidance for compliance, businesses have been receptive to the opportunity to engage in a consultative process with the OFT as a route to compliance without litigation:

- Dell Corporation agreed to change terms and conditions that unfairly excluded liability, including for breach of contract, negligence and misrepresentation.¹⁸⁰
- An internet based automobile dealer agreed to provide more transparency about its terms and the source of its products.¹⁸¹
- Dabs.com agrees "to amend unfair terms and conditions regarding returns and refunds in its consumer contracts."¹⁸²
- "Online auction sites eBay, eBid, CQout, QXL and Tazbar will now include advice and links on their sites to inform consumers of their rights under the Distance Selling Regulations."¹⁸³
- An online ticket retailer agreed to change its refund terms and conditions.¹⁸⁴
- "The operator of an online discount shopping club has agreed to revise its advertising and payment pages after the OFT raised concerns that consumers could be misled."¹⁸⁵
- Industry group for ticket retailers agreed to fairer contract terms.¹⁸⁶
- Apple and iTunes stores agreed to draft contract terms "in plain or intelligible language" and to remove terms excluding liability for mislabelled goods and change of price after purchase.¹⁸⁷

The OFT regularly conducts 'sweeps' – actively investigating and consulting – of internet businesses and issues guidance on compliance.¹⁸⁸ Reliance on consumer initiated legal or administrative process could not achieve this level of compliance as fast.

¹⁷⁸ *Commercial Law-Electronic Contracts: Pressured By European Consumer Laws, Standard Web Contracts In U.S. May Change*, The United States Law Week, 73 USLW 2607 (April 12, 2005).

¹⁷⁹ OFT (UK), publication 672, *IT consumer contracts made at a distance: Guidance on compliance with the Distance Selling and Unfair Terms in Consumer Contracts Regulations* (December 2005), available at http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft672.pdf (last visited Apr 9, 2011).

¹⁸⁰ OFT Press release, Dell to improve terms and conditions for consumers (July 6, 2006), available at <http://www.offt.gov.uk/news-and-updates/press/2006/111-06> (last visited Apr 9, 2011).

¹⁸¹ OFT Press release, Internet car dealers give undertakings to the OFT (4 October 2006), available at <http://www.offt.gov.uk/news-and-updates/press/2006/142-06> (last visited Apr 9, 2011).

¹⁸² OFT Press release, Fairer terms for online I.T. shoppers (5 July 2007), available at <http://www.offt.gov.uk/news-and-updates/press/2007/96-07> (last visited Apr 9, 2011).

¹⁸³ OFT Press release, Internet auction sites agree to highlight consumer rights (14 November 2007), available at <http://www.offt.gov.uk/news-and-updates/press/2007/155-07> (last visited Apr 9, 2011).

¹⁸⁴ OFT Press release, Spurs agrees to change its ticketing terms for rescheduled fixtures (4 December 2008), available at <http://www.offt.gov.uk/news-and-updates/press/2008/142-08> (last visited Apr 9, 2011).

¹⁸⁵ OFT Press release, Online discount scheme agrees to change sign up process (24 June 2009), available at <http://www.offt.gov.uk/news-and-updates/press/2009/75-09> (last visited Apr 9, 2011).

¹⁸⁶ OFT Press release, OFT announces clearer terms for ticket-buyers (22 July 2009), available at <http://www.offt.gov.uk/news-and-updates/press/2009/87-09> (last visited Apr 9, 2011).

¹⁸⁷ OFT Press release, Apple agrees to improve terms and conditions (27 November 2009), available at <http://www.offt.gov.uk/news-and-updates/press/2009/136-09> (last visited Apr 9, 2011).

¹⁸⁸ See, e.g., OFT Press release, OFT launches web sweep of top online retailers in run up to Christmas (23 November 2007), available at <http://www.offt.gov.uk/news-and-updates/press/2007/161-07> (last visited Apr 9, 2011).

5. Path to global uniformity

An economics justification – that standardization leads to reduced cost and improved efficiency – has been used in the United States¹⁸⁹ to create a system that standardizes internet transactions by placing all of the risk on the consumer. It is apparent that uniform regulations combined with active enforcement, as employed in the European Union, has also created a standard for internet transactions – although one where the risk is balanced away from the consumer. While no conclusive studies are available to show which model better serves the balance of technological development and consumer benefit, it is apparent that the divergent nature of the two regulatory schemes forces internet businesses to adapt their policies to multiple standards. A case can be made for moving towards a uniform global model for regulation of internet contracts and dispute resolution that matches the global scope and scale of the internet.

5.1 Market and political forces affecting jurisdictional disparity

One would be remiss to not consider the history of internet's development, along with market forces affecting the desirability of reform of internet contract law, from a jurisdictional perspective. The internet was developed in and grew from the United States.¹⁹⁰ In 2005, all of the top ten parent companies on the internet were American companies.¹⁹¹ In 2009, while the top ten changed, all of them were still American firms.¹⁹² The audience is global.

From the perspective of the United States, a formalistic interpretation of internet contracts that shifts the risks and the costs of internet transactions to the consumer is completely rational if it does not hinder growth of the industry. From the perspective of the rest of the world, a strict consumer protection regime that shifts the risks and costs of internet transactions to where the value and profits are retained is equally rational. Thus, as long as there is an imbalance between where the businesses and consumers are located, there will likely be resistance to any effort to create a globally uniform regime of regulation with respect to internet contracts. With that in mind, should the political will develop, there are viable approaches towards a globally uniform regulation of internet contracts.

5.2 Option 1: International treaty

Most observers would agree that the internet suffers from multiplicity of jurisdictions with conflicting laws.¹⁹³ International treaties can provide two routes towards creating global uniformity of internet contracts: Through either creating specific jurisdiction or uniform legislation.

5.2.1 Specific global jurisdiction

Legal systems are already familiar with specific jurisdiction. For example, criminal and civil matters are handled by different court systems; juvenile and family matters can also have their own systems. It can be equally feasible to create a special jurisdiction for handling internet transaction disputes.¹⁹⁴ In fact, the use of internet based technology to bring disputes to an internet court could provide better and cheaper access to both internet consumers and businesses by potentially resolving the dispute through the same medium that created it.

The Uniform Domain Name Dispute Resolution Policy (UDRP) is a system set up and administered by Internet Corporation for Assigned Names and Numbers (ICANN) to resolve disputes about domain

¹⁸⁹ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir, 1996).

¹⁹⁰ See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849-850 (1997).

¹⁹¹ Top 10 Parent Companies in Internet Statistics, provided by NetRatings, Inc. available at <http://www.internetworldstats.com/top10.htm> (last visited Apr 9, 2011).

¹⁹² Rick Aristotle Munarriz, *Top Internet Companies Duke It Out*, The Motley Fool (July 14, 2009), available at <http://www.fool.com/investing/general/2009/07/14/top-internet-companies-duke-it-out.aspx> (last visited Apr 9, 2011).

¹⁹³ See Wayne Brooks, *Wrestling Over the World Wide Web: ICANN's Uniform Dispute Resolution Policy for Domain Name Disputes*, 22 Hamline J. Pub. L. & Pol'y 297, 298 (2001).

¹⁹⁴ *Id.*

name ownership on the internet.¹⁹⁵ Because ICANN controls the naming system on the internet, all owners of internet domains are obligated to settle their disputes about their domain ownership through UDRP.¹⁹⁶ It thus functions as a global jurisdiction for domain ownership disputes.

A similar structure could be developed as a special jurisdiction for internet contract disputes.¹⁹⁷ The challenge with such a development will be in funding of the organization and the issue of sovereign control. Whereas UDRP is funded through domain registration fees, there is no current fee structure governing internet transactions to fund a special jurisdiction. For a global internet jurisdiction to be funded would most likely require development of an international internet taxing scheme. This prospect presents unique political and policy problems. Moreover, the jurisdiction will need to develop its own rules of procedure and laws.

5.2.2 Uniform global legislation

The world already has a very successful model for a global code – The United Nations Convention on Contracts for the International Sale of Goods (CISG). Ratified by 76 countries, CISG provides “a modern, uniform and fair regime for contracts for the international sale of goods.”¹⁹⁸ Indeed, the suggestion for development of a Global Commercial Code that would govern all contract law is neither novel nor new.¹⁹⁹ It can be argued that as communication and commerce becomes increasingly globalized, the need for a Global Commercial Code becomes more evident: “Modern means of communication knows no frontiers. When the world becomes one market, this market will require one law, and this law must include general principles of contract law.”²⁰⁰

Of course, the challenge with this approach lies in the issue of sovereignty. While nations can readily accept a framework such as the CISG, a global contract code would require national courts to apply a foreign code to govern local transactions. While this has been shown as viable in the context of the European experience, it never the less presents a political threat to sovereignty.

5.2. Option 2: Shift from private to public law

From the most basic point of view, the interpretation of consumer internet transactions that obsesses with formality and standardization of contract structure can be questioned. We know that regardless of how internet contracts are formed, and how reasonable the terms may be, the consumers simply do not read them.²⁰¹ Indeed, beyond the question of whether the words are read; research has shown that the presentation of boilerplate contracts, in itself, frustrates the ability to properly read and understand the terms of the agreement.²⁰² Simply put, on the rare occasions when the internet contracts are actually read, they are often not understood by the consumer. Thus, with boilerplate internet contracts terms, the idea of mutual assent is pure fiction. This begs the question of why, as a society, we wish to place the private law of contract over public law and common practice.

As Professor Lemley observed:

¹⁹⁵ ICANN, Domain Name Dispute Resolution Policies, available at <http://www.icann.org/en/udrp/> (last visited Apr 9, 2011).

¹⁹⁶ What Does ICANN Do?, available at <http://www.icann.org/en/participate/what-icann-do.html> (last visited Apr 9, 2011).

¹⁹⁷ See Darren L. McCarty, *Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction*, 39 Wm. & Mary L. Rev. 557, 577-80, 590 (1998) (Discussing how specific jurisdiction can deal with geographic jurisdictional concerns); Henry H. Perit, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 Ohio St. J. on Disp. Resol. 675, 676 (2000).

¹⁹⁸ United Nations Commission on International Trade Law, 1980 - *United Nations Convention on Contracts for the International Sale of Goods (CISG)*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last visited Apr 9, 2011).

¹⁹⁹ See Ole Lando, *A Vision of a Future World Contract Law: Impact of European and Unidroit Contract Principles*, 37 No. 2 UCC L. J. ART 1 (Fall 2004).

²⁰⁰ *Id.*

²⁰¹ See Part one of this paper at pages 3-4.

²⁰² See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 211 (1995); Shmuel Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 La. L. Rev. 117 (2007).

Merchants and consumers at grocery stores, restaurants, bookstores, clothing stores, and countless other retail outlets seem perfectly able to enter into contracts without a written agreement specifying their rights and obligations. Nonetheless, many of those same retail outlets impose standard form contracts on their online users.²⁰³

We do not negotiate contracts when we walk into restaurants to order meals, nor into stores to purchase objects. We could, if we preferred to, hand form contracts back and forth with the server at the restaurant or the clerk at the store. However, it simply makes no sense to create a private law, by contract, for our transactions when local custom and public law serves just as well to fill out the terms of the exchange beyond those that are specifically agreed to. Thus, when we order a meal at the restaurant we specifically agree on the meal item and price with the proprietor, leaving all of the non-negotiated terms of the ‘contract,’ such as warranties and payment terms, to public law and custom of the locality. Certainly, public laws and local customs can differ significantly among locations and jurisdictions, but there is no evidence to suggest that any difficulties they may present to a global enterprise warrants special legal accommodation. For example, the fact that the consumer exchange in a restaurant is not bound by legal formalities of a standard contract has seemingly neither harmed globally pervasive chain restaurants nor limited consumer access to their products.²⁰⁴ Indeed, with internet commerce there is no evidence to suggest that the regulations of the European Union forbidding enforcement of certain contract terms, and the lack of standardization that these policies cause with respect to United States policies, has slowed development of internet technology or increased its cost to the consumer. Yet, these real world observations seem to contradict the judicial assertion that standard contracts are “*essential* to a system of mass production and distribution.”²⁰⁵

The economic argument put forth by *ProCD* and its progeny, that enforcement of standardized *unread contract terms* is essential to mass production and ultimately benefits the consumer, is flawed. There is little argument that standardization of *manufactured goods* reduces costs to consumers. As consumers, for example, we are able to better afford clothing and shoes because we buy these items ‘off the rack’ and in standardized sizes. Certainly, these items would be much more expensive if we sought to obtain them specifically made for us from the local tailor and cobbler.²⁰⁶ The efficiency of standardization comes from economies of scale that lower the marginal cost of production. Thus, in total, more benefit is available to all parties to the transaction regardless of how the benefits are distributed.

But *contracts* are not a means of production;²⁰⁷ rather they are a means by which parties choose to allocate costs and benefits of their transactions. Manufacturing and distribution economies of scale – whereby Google provides the services of the same computer code to all clients or McDonalds mass produces its fries – reduces marginal costs of production and yields a net benefit by reducing net costs to *all* parties. Standard contracts terms that merely shift economic risk do not. Google may arguably reduce its dispute resolution costs and associated liability by contract, and theoretically pass these savings to some consumers in terms of lower prices; but for the many consumers who could obtain a reduced cost, there will be a Feldman who may pay much more than he bargained for. Such a policy choice to shift benefits among the parties does not create any more total benefits. To the mathematically inclined, the system is zero sum. To the realistically inclined, it lets the big concern take more benefits of the transaction and leave the consumers to play economic roulette for what remains.

As such, the flaw in the *ProCD* rationale stems from confounding of the difference between manufacturing processes and contract terms. Indeed, standardization of the former *is* essential to our systems of mass production and distribution; standardization of the latter is not. This critical distinction is reflected by observations of the real world. McDonalds operates “more than 32,000 local restaurants

²⁰³ Mark A. Lemley, *Terms Of Use*, 91 Minn. L. Rev. 459, 466 (December 2006).

²⁰⁴ For example, McDonalds has “more than 32,000 local restaurants serving more than 60 million people in 117 countries each day.” Our Company – About McDonalds, *available at*: http://www.aboutmcdonalds.com/mcd/our_company.html (last visited Apr 24, 2011); Subway operates more than 34,000 restaurants in 98 countries. Subway FAQ’s, *available at*: <http://www.subway.com/subwayroot/AboutSubway/subwayFaq.aspx#5> (last visited Apr. 24, 2011).

²⁰⁵ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir, 1996) (emphasis added).

²⁰⁶ It may be that we would benefit from even lower costs if we had further standardization. Specifically, all clothing and shoes could be produced in a standard one-style, one-color and one-size-fits-all format. However, as a society, we seem to tolerate higher costs to avoid a level of standardization that would leave us either in an Orwellian nightmare or wearing bathrobes and clown shoes as our sole style options.

²⁰⁷ Other than, of course, for billable hours.

serving more than 60 million people in 117 countries each day.”²⁰⁸ Obviously, standardization of their *production methods* is essential in making this possible. Equally obvious, the 60 million customers each day are not required to agree to standard contract terms to obtain a Big Mac™ and fries. Certainly, the laws governing standards of merchantability, restaurant liability and dispute resolution procedures must differ significantly among the 117 countries in which McDonalds operates. Thus, the assertion that standardization of *contract terms* is essential to our modern system of mass production and distribution, and ultimately beneficial to consumers, is as much a fiction as the idea of mutual assent to such boilerplate terms. While standardization of contracts may be a valid policy choice in relation to how benefits to certain transactions are distributed, such standardization is neither essential to modern life nor produces a net benefit to consumers.

Regardless, *ProCD*’s rationale fails for the more important reason that it seeks to establish an unstable equilibrium. Judge Easterbrook concedes that each jurisdiction has the power to forbid standard contract terms.²⁰⁹ As different jurisdictions forbid the enforcement of particular terms – which they have already begun to do in exercise of their powers – the purveyors of the standard contracts are robbed of the purported standardization. Internet companies currently exist in a global environment where in some jurisdictions some of their terms are unenforceable. Indeed, as different jurisdictions move to disallow different terms, the only viable standardized contract – if that is indeed the coveted goal – will be one that meets the most restrictive requirements of *all* jurisdictions. The only stable equilibrium that can form in that condition is one where no boilerplate terms remain in the contract and the only private contract terms are those which have been specifically negotiated.

As such, disavowing the legal fiction of the consumer’s assent to unseen and unread terms provides an elegant and simple solution that matches the real world observation that consumers do not read and understand such terms. By that method, the terms of the contract would be determined by specifically negotiated terms, and local laws and custom fill the void. One may argue that doing so may expose internet companies to potentially onerous conditions in some jurisdictions. However, the internet business has the technical means through the Internet Protocol addressing scheme²¹⁰ to know where it is dealing, and as such is perfectly equipped to ‘take it or leave it.’ To date, there is no evidence that internet companies have elected not to deal in jurisdictions that disallow their unilateral contract terms, nor that consumers have paid a greater price because of it. But even if that were to occur, surely the economists would agree that market and competitive forces are likely better suited to adjust to the local anomaly and bring the benefits of the internet back to the consumers for the right price.

5.3 Option 3: Wait for market pressure to produce conformity

Internet businesses change and adapt their terms of service to meet market and regulatory requirements. Indeed, the European Union unfair contract terms law has already affected United States based internet businesses and led to change in their terms.²¹¹ As an example, European directives require that contract terms be drafted in plain language and be intelligible.²¹² As such, terms that are misleading or misunderstood can be found to be unfair and unenforceable. The standard put forth by the UK Office of Fair Trading is that the consumers should be able to understand the terms without needing legal advice. In France, domestic legislation requires that the terms be supplied in French.²¹³

Internet companies follow a general approach of including all the terms that they could wish for in their agreements; they function with the prospect that some particular terms may not be enforceable in some jurisdictions. However, the plain language rules put forth by the European Union have a unique effect. If the agreement is not written in plain terms, then it is simply not enforceable, regardless of the substance of the terms. The agreements needed to conform.

²⁰⁸ Our Company – About McDonalds, available at: http://www.aboutmcdonalds.com/mcd/our_company.html (last visited Apr 24, 2011).

²⁰⁹ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir, 1996).

²¹⁰ Every person accessing the internet utilizes an IP address. “Pairing of IP address to a geographical location is called geolocation.” This allows ecommerce websites to know where customers are located. <http://www.iplocation.net/> (last visited Apr 10, 2011).

²¹¹ Jane K Winn and Mark Webber, *The impact of EU Unfair contract terms law on U.S. Business-to-consumer internet merchants*, The Business Lawyer, vol. 62 (Nov. 2006).

²¹² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Article 5.

²¹³ Law No. 94-665 of August 4, 1994, Journal Officiel de la Republique Franc, available at <http://www.culture.gouv.fr/culture/dgdl/lois/loi-fr.htm>.

Consider for example the Facebook terms of service, available in multiple languages, for readability.²¹⁴ Google goes further, by not only providing a ‘term of service’ written in plain language,²¹⁵ but providing a separate page that seeks to explain the terms in language that one may use with a child:

We spell out those rights and responsibilities in our Terms of Service. You should read the Terms. Really. We also know that legal documents can be boring and that you might not always do what you “should.” So, we’ve tried to give you the basics here.²¹⁶

Thus, as internet firms seek to do business in any given forum, the mandates of that forum can help to create some uniformity. Moreover, consumers can help to create uniformity in internet contracts by paying more attention to the terms. Lawyers in the business of drafting internet contracts understand that “by the very nature of the medium, any online contract may be both a legal document and a marketing tool. An agreement that contains excessive legal jargon or which is extremely one-sided may be both difficult to enforce and potentially raise public relations issues.”²¹⁷ As such, it would seem that as the global market becomes more uniform, and as consumers become more informed, internet contracts may also move towards uniformity.

Thus, one possible choice is to follow the path of least resistance and wait. Given the political realities and the geographic imbalance of where the internet consumers and businesses are located, this option may be the most viable path.

6. Conclusion

Regulation and enforcement of internet contracts varies geographically. Generally, there are two primary legal approaches to internet contract enforcement: The United States model that relies on basic notice requirements to establish and enforce terms; and the European Union model that focuses on fundamental fairness in transactions between businesses and consumers.

The United States model seeks to protect the internet business entities from liability, while passing on the risks of the transactions to the consumers. At the same time, the United States model relies on high-cost litigation to enforce contracts and develop the law. As such, contractual terms are usually employed to reduce litigation cost and risk for the internet business, thereby maintaining the status quo.

The European Union approach follows a social regulation model that focuses on legislation and regulation as a means of balancing the risks and costs of internet transactions among the participants. While legislation seeks to preserve the consumer’s right to legal redress, litigation is very seldom used as an enforcement method.

The global reach and efficiency of scale of the internet would be best utilized in the context of a global regulatory and dispute resolution system; however, strong political and economic barriers to such an implementation are present. As most of the Internet players are located in the United States, it is unlikely to accept any regulatory regime that shifts costs and risks back to its shores. It is equally unlikely that the European Union would accept a move towards a United States style of internet contract governance. Moreover, accepting a global code for internet contract regulation would require all participants to relinquish some sovereignty and control over development of their national legal system. The increasingly divergent philosophies and approaches of the United States and the European Union make bridging of the gap improbable. Based on these parameters, the likely path to harmonization may be one that relies on market forces to slowly shift internet contracting norms.

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²¹⁴ Facebook, *Statement of Rights and Responsibilities*, available at <http://www.facebook.com/terms.php?ref=pf> (last visited Apr 9, 2011).

²¹⁵ Google Terms of Service, available at <http://www.google.com/accounts/TOS> (last visited Apr 9, 2011).

²¹⁶ Google Terms of Service Highlights, available at <http://www.google.com/accounts/tos/highlights/utos-us-en-h.html> (last visited Apr 9, 2011).

²¹⁷ Ian C. Ballon, *E-Commerce and Internet Law*, 14.02 (2010-2011 Update).



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