

2002

CAVEAT SURFER: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites

Drew Block

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Drew Block *CAVEAT SURFER: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites*, 14 *Loy. Consumer L. Rev.* 227 (2002).

Available at: <http://lawcommons.luc.edu/lclr/vol14/iss2/6>

This Consumer News is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

NEWS

CAVEAT SURFER: Recent Developments in the Law Surrounding Browse-Wrap Agreements, and the Future of Consumer Interaction with Websites

Drew Block*

I. Introduction

The incredible growth of the Internet over the course of the past decade has fundamentally changed the way people interact with the world. This change is evidenced through electronic communications, information gathering, and every aspect of consumer culture through the growth of e-commerce. Due to the rapidity of this growth, however, the legal community has struggled to define the terms of this new form of interaction.

In order to regulate the use of information and services found on websites, many websites have created license and use agreements that purport to have the effect of enforceable contracts.¹ Of the many types of agreements found on the Internet, one of the most pervasive types are those known as browse-wrap agreements.² These agreements are most commonly found in small print hyperlinks at the bottom of home pages.³ The hyperlinks generally link to other pages that lay out

* J.D. candidate, May, 2003; Loyola University Chicago School of Law; B.A., History, Classics, 2000, The Ohio State University.

¹ Dawn Davidson, Comment, *Click and Commit: What Terms are Users Bound to When They Enter Web-Sites?*, 26 WM. MITCHELL L. REV. 1171, 1173 (2000).

² The term "browse-wrap" appears in *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000); *see also* *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 594-95 (S.D.N.Y. 2001).

³ *Specht*, 150 F. Supp. 2d at 594. Hyperlinks may be found on many major websites, including <http://www.amazon.com>, ("Conditions of Use"),

the terms and conditions between the user and the site. These terms and conditions attempt to control use of the website and become enforceable as soon as the user moves beyond the home page.⁴ Browse-wrap agreements are of questionable enforceability, however, because of their lack of one of the traditional elements of a contract, namely mutual assent between the contracting parties.⁵

The lack of mutual assent in browse-wrap agreements is evident in the fact that the user is not required to actually view the terms of the agreement before proceeding beyond the home page, at which point the agreement is said to become valid.⁶ This characteristic distinguishes browse-wrap agreements from shrink-wrap and click-wrap agreements, which have been enforced by several courts.⁷ Nevertheless, few courts have reached the issue of the enforceability

<http://www.eBay.com>, (“User Agreement”), <http://www.msn.com>, (“Terms of Use”), and <http://www.aol.com>, (“Legal Notices”).

⁴ See, e.g., <http://www.expedia.com> (last visited Feb. 21, 2002), a well known travel site. Under the “Expedia.com terms of use” link found at the bottom of the home page, the first paragraph of the notice states:

AGREEMENT BETWEEN CUSTOMER AND EXPEDIA, INC.

This Website is offered to you, the customer, conditioned on your acceptance without modification of the terms, conditions, and notices contained herein. Your use of this Website constitutes your agreement to all such terms, conditions, and notices.

Thus, one can clearly see that no active assent is necessary. Use of the site is said to constitute assent, and the user is not required to view the license agreement.

⁵ The best discussion of this problem can be found at *Specht*, 150 F. Supp. 2d at 594-96. See also Susan Y. Chao, Casenote, *Contract Law-Electronic Contract Formation-District Court for the Central District of California Holds That a Website License Does Not Equate to an Enforceable Contract*-Ticketmaster Corp. v. Tickets.com, Inc., 54 SMU L. REV. 439, 443 (2001).

⁶ See *supra* note 4; see also *Specht*, 150 F. Supp. 2d at 594.

⁷ See, e.g., *ProCd v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (shrink-wrap agreements held valid); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148-49 (7th Cir. 1997) (holding that a contract shipped with a computer to be enforceable even though it contained “the same sort of accept-or-return offer ProCD made to users of its software”); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530, 533 (N.J. Super. Ct. App. Div. 1999) (while the *Caspi* court never used the term “click-wrap agreement,” they held a contract valid where the “membership agreement appears on the computer screen in a scrollable window next to blocks providing the choices ‘I Agree’ and ‘I Don’t Agree’”).

of browse-wrap agreements, and consequently, this aspect of contract law is ill defined.

II. Background

There are three primary forms of agreements employed by software and website providers. These types of agreements are known as “shrink-wrap,” “click-wrap,” and “browse-wrap” agreements, and while all three primarily deal with issues of licensing, they differ dramatically in form. It is necessary to briefly explain click-wrap and shrink-wrap agreements because the little case law dealing with browse-wrap agreements has stemmed from judicial determinations concerning these agreements.

A. Shrink-Wrap Agreements

The term “shrink-wrap” agreement describes contracts contained within the packaging of software, with notice of such contract on the outside of the packaging.⁸ The purchaser of software containing a shrink-wrap agreement is bound by the terms of the agreement even though the purchaser cannot read the terms of the agreement before purchasing the product.⁹ Generally, these agreements are found enforceable as soon as the purchaser uses the product because use proves the purchaser had an opportunity to read the terms of the agreement in the package.¹⁰

B. Click-Wrap Agreements

One type of agreement commonly found on the Internet is the “click-wrap” agreement. Click-wrap agreements appear on computer screens when a user enters a website. The agreement requires the user to either agree or disagree with the presented terms by clicking on a box stating “I Agree” or “I Disagree.”¹¹ These agreements most

⁸ *Specht*, 150 F. Supp. 2d at 592.

⁹ *ProCD*, 86 F.3d at 1449.

¹⁰ *Id.* at 1452. It is also notable, that with regard to *ProCD*, a click-wrap license was also included as part of the software, and therefore the user would have to actively assent to the terms of the agreement.

¹¹ *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1999).

commonly appear when a user downloads or installs software, or requests some service from a website. The notable aspect of this type of agreement is that the user is required to take an affirmative step in agreeing with the terms presented, and therefore, presumably has an opportunity to read and consent to the terms and conditions imposed by the agreement.

C. Browse-Wrap Agreements

The most common type of agreement found on the Internet is the browse-wrap agreement, and this type of agreement takes many different forms. Generally, they are found in small print hyperlinks at the bottom of home pages, and these hyperlinks generally link to another page that lays out the terms of use for the particular website.¹² This type of agreement has come to be known as a browse-wrap agreement, rather than a click-wrap agreement, because the user need not click an "I Agree" button in order to continue viewing the site, and must in fact *browse* the page in order to locate the agreement.¹³

Browse-wrap agreements purport to control use of the website and become enforceable as soon as the user moves beyond the home page.¹⁴ The notable characteristic of this type of agreement is that the user is not forced to read the terms before proceeding beyond the home page, and may not even be aware of the existence of the agreement. Confusion about these agreements is compounded by a startling lack of uniformity with regard to the notice of their existence. The title of the links giving access to these agreements vary from site to site, and may be titled "user agreement,"¹⁵ "conditions of use,"¹⁶ "terms of use,"¹⁷ "legal notices,"¹⁸ "terms,"¹⁹ or other similar language chosen by the website designer.

¹² The term "browse-wrap" appears in *Pollstar*, 170 F. Supp. 2d at 981; *see also Specht*, 150 F. Supp. 2d at 594-95.

¹³ *Specht*, 150 F. Supp. 2d at 594. Hyperlinks may be found on many major websites, including <http://www.amazon.com>, ("Conditions of Use"), <http://www.eBay.com>, ("User Agreement"), <http://www.msn.com>, ("Terms of Use"), and <http://www.aol.com>, ("Legal Notices").

¹⁴ *See supra* note 4.

¹⁵ *E.g.*, <http://www.eBay.com> (last visited Jan. 29, 2002).

¹⁶ *E.g.*, <http://www.amazon.com> (last visited Jan. 29, 2002).

¹⁷ *E.g.*, <http://www.msn.com> (last visited Jan. 29, 2002).

¹⁸ *E.g.*, <http://www.aol.com> (last visited Jan. 29, 2002).

III. Problem with Browse-wrap Agreements – Lack of Mutual Assent

The greatest problem with enforcing browse-wrap agreements is the distinct possibility of a lack of mutual assent between the Internet user and the website as to the terms of the agreement. Manifestation of mutual assent is necessary for the formation of any binding contract:

Mutual assent which is essential to the formation of a binding contract must be manifested by one party to the other. Such mutual assent cannot be based on subjective intent, but must be founded on an objective manifestation of mutual assent to the essential terms of the promise. In other words, the entry of the parties into a contractual relationship must be manifested by some intelligible conduct, act, or sign The meeting of minds, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed or manifested intentions²⁰

Mutual assent has been defined in several ways, and the acceptable methods by which mutual assent may be manifested varies depending on the definition. While mutual assent is vital to any enforceable contract, evidence of mutual assent may be found without formal oral or written agreement. The Restatement (Second) of Contracts defines manifestation of mutual assent as:

- (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
- (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.

¹⁹ *E.g.*, <http://www.cnn.com> (last visited Jan. 29, 2002).

²⁰ 17 AM. JUR. 2D *Contracts* § 28 (1991).

- (3) The conduct of the party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.²¹

There is a clear difficulty in fitting browse-wrap agreements into the traditional context of contract law. It would be difficult to show mutual assent on the part of the user when there is no evidence that the user actually read the terms or knew they existed. Moreover, there is no evidence that the user ever intended to be bound by the terms of the browse-wrap agreement because the user is not required to affirmatively agree to, or even read, the terms of the agreement. Nevertheless, very little litigation has developed around the enforceability of these agreements, and until very recently no court definitively held these agreements to be valid or invalid. However, by tracing the recent case law in this area, one can see the emergence of a trend in the law that may lead to blanket unenforceability of browse-wrap agreements, and the standardization of the methods employed to give users notice of the existence of on-line contracts.

IV. Development of Case Law Regarding Browse-wrap Agreements

In order to understand the growing body of case law surrounding browse wrap agreements, and the reasoning behind the judicial determinations in this area, one must first look to the cases that developed from shrink-wrap and click-wrap agreements. The cases dealing with these types of agreements essentially form one line, and the courts have used the reasoning of prior shrink and click-wrap cases in order to develop case law regarding browse-wrap agreements.

A. Shrink-Wrap Agreements

The leading case that upheld the enforceability of shrink-wrap license agreements is *ProCD v. Zeidenberg*,²² decided in the Seventh Circuit. In *ProCD*, the court considered a software license agreement

²¹ RESTATEMENT (SECOND) OF CONTRACTS § 19 (1981).

²² 86 F.3d 1447 (7th Cir. 1996).

enclosed within the product packaging.²³ Additionally, the license was “encoded on the CD-ROM disk,” and “appear[ed] on the user’s screen every time the software” ran.²⁴ ProCD’s software contained a database of more than 3,000 telephone directories, which it compiled at considerable expense.²⁵ Zeidenberg ignored the license term that stated that the information contained in the program must only be used for non-commercial purposes, and proceeded to resell the information contained on the software.²⁶ As a result, ProCD filed suit seeking an injunction on the basis that Zeidenberg’s dissemination of ProCD’s database exceeded the rights specified in the agreement.²⁷

In holding that this license agreement was valid as an enforceable contract,²⁸ the court determined that it was impractical to print all the terms on the outside of the package.²⁹ Furthermore, because the agreement was printed inside the packaging, Zeidenberg could have simply returned the product if he chose not to agree with the terms.³⁰ Most important to the court, however, was the fact that the software could not be used without awareness of the terms, because “the software splashed the license on the screen and would not let him proceed without indicating acceptance.”³¹ The court stated that the “vendor, as master of the offer, may invite acceptance by conduct,” and that “a buyer may accept by performing acts the vendor proposes to treat as acceptance.”³² Based on this determination, the court held that shrink-wrap licenses are enforceable unless the terms are objectionable for being unconscionable or violative of positive law.³³

²³ *Id.* at 1449.

²⁴ *Id.* at 1450.

²⁵ *Id.* at 1449.

²⁶ *Id.* at 1450.

²⁷ *Id.*

²⁸ *Id.* at 1449.

²⁹ *Id.* at 1451.

³⁰ *Id.*

³¹ *Id.* at 1452.

³² *Id.*

³³ *Id.* at 1449.

The reasoning in *ProCD* was expanded upon in *Hill v. Gateway 2000, Inc.*³⁴ In *Hill*, a Gateway customer ordered a computer by telephone, and the computer subsequently arrived in a box.³⁵ Within the box, there was a license agreement that contained an arbitration clause, as well as a provision that stated that the terms of the agreement were to govern all disputes unless the computer was returned within 30 days.³⁶ The customer, more than 30 days after receiving the computer, chose to bring suit based on Gateway's warranty.³⁷ Gateway moved to compel arbitration based on the terms of the license agreement.³⁸

The court held that by keeping and using the computer for more than 30 days, the customer effectively assented to the terms of the license agreement, and therefore was bound by the arbitration clause.³⁹ The court stated that "a contract need not be read to be effective"⁴⁰ This reasoning is essentially an extension of a statement made in *ProCD*, that "ProCD proposes a contract that the buyer would accept by using the software after having an opportunity to read the license at leisure."⁴¹ Regardless of whether Hill actually read the terms of the agreement, the *Hill* court concluded that he effectively assented to the agreement through use of the product alone.⁴²

B. Click-wrap Agreements

The above cases have been extensively cited as grounds for enforcing click-wrap agreements.⁴³ However, not all jurisdictions follow the *ProCD* reasoning.⁴⁴ A leading click-wrap agreement case,

³⁴ 105 F.3d 1147 (7th Cir. 1997).

³⁵ *Id.* at 1148.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1149.

³⁹ *Id.* at 1149-50.

⁴⁰ *Id.* at 1148.

⁴¹ *ProCD*, 86 F.3d at 1452.

⁴² *Hill*, 105 F.3d at 1150.

⁴³ See, e.g., *Specht*, 150 F. Supp. 2d at 594-95; *Hill*, 105 F.3d at 1148.

⁴⁴ *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000).

Caspi v. Microsoft Network, L.L.C., enforced a click-wrap agreement not based on shrink-wrap cases, but rather by comparing click-wrap agreements to other types of contracts that have been held enforceable without evidence that the purchaser had actual notice of particular terms.⁴⁵ While every court that has dealt with click-wrap agreements has held them to be enforceable,⁴⁶ a nagging uncertainty with regard to the notice issue is evident in the *Caspi* opinion. This uncertainty has led to a change in the way courts view browse-wrap agreements.

Caspi was a class action law suit by some 1.5 million Microsoft Network (“MSN”) members based on MSN’s practice of “rolling over” members into more expensive plans without permission or notice to the members.⁴⁷ MSN subsequently sought to dismiss the action for lack of jurisdiction pursuant to the forum selection clause found in the MSN membership agreement, which provided that every member consents that all disputes arising from use of MSN was within the exclusive jurisdiction and venue of the courts in King County, Washington.⁴⁸ The clause was found within a click-wrap agreement that must be agreed to before the member may use the service, and before the member can be billed for the use of the service.⁴⁹ The Superior Court of New Jersey, Appellate Division, affirmed the trial court’s decision to dismiss the complaint, holding that the forum selection clause was valid.⁵⁰

The above court followed the logic of *Carnival Cruise Lines v. Shute*, which stated that a forum selection clause was reasonably communicated to the consumer when it was presented in fine print, within three pages of such fine print, and connected to the cruise ticket.⁵¹ The *Caspi* court discerned no great difference between the

⁴⁵ *Caspi*, 732 A.2d at 530.

⁴⁶ *Specht*, 150 F. Supp. 2d at 594.

⁴⁷ *Caspi*, 732 A.2d at 529.

⁴⁸ *Id.* at 529.

⁴⁹ *Id.* at 530.

⁵⁰ *Id.* at 529, 533.

⁵¹ *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991). It must be noted that this case does not deal with click-wrap agreements, nor even the Internet, but is rather the leading case dealing with the validity of forum selection clauses. *Carnival* held valid a forum selection clause contained within three pages of fine print and connected to the cruise ticket, and therefore dealt with the issue of whether such a clause would be valid even if the consumer was unaware of its existence.

print and electronic mediums, and therefore held that the forum selection clause was valid.⁵²

The significance of *Caspi* is that the court found that a clause within an online contract can be valid. However, the *Caspi* court stated that *Carnival* did not control with regard to notice of the term, because the plaintiff's in that case conceded that they had notice of the forum selection clause.⁵³ The *Caspi* court determined that an MSN user would be able to browse through the terms before accepting, thus receiving notice of any terms of the contract.⁵⁴ Because *Caspi* was determined to have had notice of the agreement, the court left open the issue as to the enforceability of an agreement of which the user did not have actual notice.⁵⁵ The court stated that the issue of reasonableness of notice is one of law rather than fact, and in this case, the plaintiff's simply failed to show that they were not given adequate notice of the term.⁵⁶ Therefore, the court noted that either party might be able to show that click-wrap agreements in the form at issue are not enforceable contracts, apart from the question of the validity and enforceability of a forum selection clause in an otherwise enforceable contract.⁵⁷

C. Browse-wrap Agreements

The click-wrap agreement seen in *Caspi* is fundamentally different than a browse-wrap agreement because users are actually forced to click "I Agree," thus giving the user an opportunity to read the terms of the agreement. The court noted that because users must click "I Agree," the users must have known that they were entering into some kind of contract, and therefore invalidating all such contracts would hamper commerce.⁵⁸ This is in contrast to the browse-wrap agreement that must be actively sought out and read in order for the user to be aware of the terms that regulate any movement within

⁵² *Caspi*, 732 A.2d at 532.

⁵³ *Id.*; see also *Carnival*, 499 U.S. at 590.

⁵⁴ *Caspi*, 732 A.2d at 532.

⁵⁵ *Id.* at 533.

⁵⁶ *Id.* at 532-33.

⁵⁷ *Id.* at 533.

⁵⁸ *Id.* at 532.

the website beyond the home page. The *Caspi* court was clearly aware of the problem inherent in assuming that a user will actually scroll through a complicated contract while actively engaged in Internet activities. This is evident both in the court's aforementioned statements concerning the problems of notice, as well as other statements regarding the form in which an Internet contract takes.⁵⁹

The *Caspi* court discussed the possible problems of enforceability that may develop if a website uses different typefaces, colors, or font sizes, in order to confuse the user, or conceal or de-emphasize certain terms.⁶⁰ While the court held that the MSN contract did not present its contract in a misleading manner, the fact that the court discussed such behavior is evidence that the court believed that an agreement may be held to be unenforceable if presented in a deceptive manner.

Despite the fact that *Caspi* seemed to confirm a judicial trend towards blanket enforceability of all online contracts, two cases were decided in California the following year that began a trend in the opposite direction based on the concerns about notice and deception enumerated by the *Caspi* court.

1. Ticketmaster Corp. v. Tickets.Com, Inc.

The first California case is *Ticketmaster Corp. v. Tickets.Com, Inc.*, decided in the U.S. District Court Central District of California.⁶¹ Ticketmaster operated a website that allowed consumers to purchase tickets to events that it often had an exclusive right to sell.⁶² The Ticketmaster home page contained a browse-wrap agreement entitled "terms and conditions," which was only accessible if the user scrolled down to the bottom of the page and located the small print hyperlink.⁶³ The terms and conditions presented on this link were effectuated upon the user as soon as the user ventured any further within the site beyond

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. 99CV7654, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. Mar. 27, 2000).

⁶² *Id.* at *2.

⁶³ *Id.* at *2, *3.

the home page.⁶⁴ The user, however, was able to go “deeper” into the site without reading the terms.⁶⁵

Tickets.Com operated a similar website that allowed users to purchase tickets to various events.⁶⁶ Additionally, Tickets.Com’s site also gave information about events to which it did not sell tickets, and gave hyperlinks to other websites where such tickets were available to buy.⁶⁷ Thus, when a Tickets.Com customer clicked on “Buy this ticket from another on-line ticketing company,” the customer was linked to an interior page of Ticketmaster where the user could buy the ticket from Ticketmaster.⁶⁸ This bypassed the home page where the terms and conditions link was available and is a practice alternately known as hyperlinking or deep-linking. This practice was forbidden by the terms and conditions page presented on the Ticketmaster home page.⁶⁹

In this case, Ticketmaster alleged several causes of action against Tickets.Com, however, the salient portion of the complaint with regard to this discussion was the third claim – a breach of contract action based on a violation of the terms and conditions set forth on the Ticketmaster home page.⁷⁰ The terms of the agreement provide that anyone going beyond the home page must comply with the terms, which include that the information on the site must be used for non-commercial purposes, and that deep-linking to the site was not permitted.⁷¹ Tickets.Com sought to dismiss this claim, along with the others brought by Ticketmaster.⁷²

In order to defend its claim, Ticketmaster cited the shrink-wrap license cases. However, the court distinguished the browse-wrap agreement seen in this case from the shrink-wrap license because shrink-wrap agreements are “open and obvious and in fact hard to miss.”⁷³ The court further distinguished browse-wrap agreements from

⁶⁴ *Id.* at *3-*4.

⁶⁵ *Id.*

⁶⁶ *Id.* at *3.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at *3, *7.

⁷⁰ *Id.* at *1, *7.

⁷¹ *Id.* at *7.

⁷² *Id.* at *1.

⁷³ *Id.* at *8

click-wrap agreements because the Ticketmaster site does not require the affirmative step of agreeing to the terms and conditions before venturing further into the site.⁷⁴ Therefore, the court held that because many customers would likely proceed past the home page without scrolling to the bottom of the page in order to click on the terms and conditions link, it could not be said that “merely putting the terms and conditions in this fashion necessarily creates a contract with one using the website.”⁷⁵ Tickets.Com's motion to dismiss was then granted with regard to the breach of contract claim, with leave to amend for Ticketmaster to present facts showing Tickets.Com's knowledge of, and implied agreement to, the terms.⁷⁶

While the *Ticketmaster* court did not make a definitive statement about the enforceability of browse-wrap agreements in general, the opinion gives weight to the *Caspi* court's concerns about notice and deceptive practices. *Ticketmaster* stands for the notion that browse-wrap agreements are far from *per se* enforceable. Seemingly, Ticketmaster's agreement could not be valid unless it could prove that Tickets.Com had *actual* notice of the agreement. Therefore, the clear message of the *Ticketmaster* court is that websites with terms and conditions should be presented in the click-wrap format in order to force actual notice upon users of the website, and consequently avoid the risk of litigation resulting from lack of notice.

2. Pollstar v. Gigmania Ltd.

The second California case is *Pollstar v. Gigmania Ltd.*, which contains an almost identical fact pattern as that seen in *Ticketmaster*.⁷⁷ Pollstar developed a website that contained concert information, and alleged that Gigmania downloaded information off the Pollstar site and used this information on its own site.⁷⁸ Pollstar alleged a breach of contract claim based on a breach of its browse-wrap license

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000).

⁷⁸ *Id.* at 976.

agreement.⁷⁹ Gigmania filed a motion to dismiss this claim based on a lack of mutual assent with regard to the license agreement.⁸⁰

The browse-wrap agreement in *Pollstar* was not set forth on the home page, but could only be accessed by linking to another page.⁸¹ Moreover, the court was concerned about the confusing and deceptive manner in which the agreement was presented to users.⁸² In *Pollstar*'s website, notice of the agreement was given in small gray print against a gray background.⁸³ Also, the notice was not underlined according to common Internet practice to show an active link, and therefore, the court noted that many users would not be aware of the link.⁸⁴ The home page also contained many words in small blue print that did not link to another page when clicked on, which is also contrary to standard practice.⁸⁵ The result of this behavior by *Pollstar* would be to confuse users by causing them to believe that all colored small text does not link to another page, which is contrary to the fact that the terms and conditions page is in fact linked by small colored print.⁸⁶

Pollstar, like *Ticketmaster*, attempted to compare its browse-wrap agreement to the shrink-wrap agreements that had previously been held to be enforceable in *ProCD*.⁸⁷ The court distinguished browse-wrap and shrink-wrap agreements, but noted that no court had ruled on the enforceability of browse-wrap agreements.⁸⁸ However, the court did agree with *Gigmania* that many visitors to the *Pollstar* website may not be aware of the agreement because notice of the agreement is provided by "small gray text on a gray background."⁸⁹ Therefore, the court determined that a lack of mutual

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 981.

⁸² *Id.*

⁸³ *Id.* at 982.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 981.

⁸⁸ *Id.*

⁸⁹ *Id.*

assent was a valid issue in light of the problems with notice.⁹⁰ However, the *Pollstar* court simply chose not to decide the mutual assent issue and was not willing to declare on the validity and enforceability of browse-wrap agreements in general.⁹¹

Rather, the court stated that browse-wrap agreements may arguably be valid and enforceable based on examples of other contracts that are enforceable despite the fact that the consumer enters into the contract without first seeing the terms.⁹² These contracts include those attached to airline and concert tickets, which are enforced when the consumer either boards the plane or enters the concert.⁹³ While the court failed to decide the issue of the enforceability of browse-wrap agreement, the court did discuss some of the same concerns about notice expressed in *Caspi* and *Ticketmaster*.⁹⁴

3. A Possible End to the Controversy: *Specht v. Netscape Communications Corp.*

Specht, decided on July 3, 2001 in the United States District Court for the Southern District of New York, dealt with a browse-wrap agreement in the context of free software offered on the Internet.⁹⁵ The litigation in this case developed out of a class action alleging that software offered by the defendant transmitted private information about user's file transfer activity to the defendant in violation of two

⁹⁰ *Id.* at 982.

⁹¹ *Id.*

⁹² *Id.* at 981.

⁹³ *Id.*

⁹⁴ These issues include problems of notice, such as the fact that the user may not have read the terms of the agreement. However, more important to this discussion are the statements about the confusion of users about the nature of such agreements, and the difficulty in even finding the browse-wrap licenses. These concerns become more problematic because of the lack of uniformity in the notice of browse-wrap agreements, and through deceptive practices such as those seen in the *Pollstar* case (such as giving notice of the agreement in small gray print against a gray background).

⁹⁵ *Specht*, 150 F. Supp. 2d at 587.

federal statutes.⁹⁶ The software, known as SmartDownload, was available from the Netscape website free of charge.⁹⁷ While use of Netscape Navigator requires assent to a click-wrap agreement, the SmartDownload software was governed by a browse-wrap agreement.⁹⁸ Netscape moved to compel arbitration of the claims, arguing that the dispute was subject to a binding arbitration clause found in SmartDownload's browse-wrap license agreement.⁹⁹ The court was therefore asked "to decide if an offer of a license agreement, made independently of freely offered software and not expressly accepted by the user of that software, nevertheless binds the user to an arbitration clause contained in that license."¹⁰⁰ The court held that arbitration should not be compelled because the browse-wrap agreement was not an enforceable contract.¹⁰¹

Following a discussion of the case law surrounding shrink-wrap and click-wrap agreements, the court concluded that the SmartDownload agreement was a browse-wrap agreement such as that seen in *Pollstar*.¹⁰² The court rejected the notion that simply downloading the software indicated assent, because downloading is done for the purpose of obtaining a product, not to assent to an agreement.¹⁰³ The user downloading the software did not need to view any agreement, and was not given any notice that such agreement existed.¹⁰⁴ The only notice of the agreement "is one small box of text referring to the license agreement, text that appears below the screen used for downloading."¹⁰⁵ The *Specht* court concluded that mutual assent "is the bedrock of any agreement to which the law will give force. Defendant's position, if accepted, would so expand the

⁹⁶ *Id.* The statutes at issue were the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq. (2001), and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2001).

⁹⁷ *Specht*, 150 F. Supp. 2d at 587.

⁹⁸ *Id.* at 595.

⁹⁹ *Id.* at 587.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 596.

¹⁰² *Id.* at 591-94

¹⁰³ *Id.* 595.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

definition of assent as to render it meaningless.”¹⁰⁶ Arbitration was not compelled, simply because the court held that the plaintiffs did not assent to the license agreement.¹⁰⁷

V. Conclusion: The Future of Browse-wrap Agreements

The *Specht* opinion can be seen as both the logical and chronological result of all the preceding cases dealing with on-line contracts. Of the three types of agreements discussed, browse-wrap agreements demand the least consumer interaction because they need not even be viewed. Both click-wrap and shrink-wrap agreements purport to demand notice of the terms, whether or not the consumer in fact reads them, and thus they are more apt to be held enforceable. The problem of mutual assent is greatest when dealing with the enforceability of browse-wrap agreements, and thus it is logical that these agreements have become the most difficult for courts to hold valid. While the courts, up until the *Specht* court, hesitated to make a definitive statement about the enforceability of browse-wrap agreements, it seems difficult to argue with the *Specht* reasoning. Therefore, the next logical progression in the jurisprudence concerning browse-wrap agreements is that they will increasingly be held to be invalid.

The clear message given by these cases to website operators is that click-wrap agreements are vastly preferred to browse-wrap agreements. The problems concerning notice and mutual assent with browse-wrap licenses are so pervasive that it renders them ineffectual. Therefore, it seems likely that in the future, Internet users may find themselves faced with a click-wrap agreement every time they enter a new home page. While this may result in breaking up the continuity of the Web experience, the trade-off of knowing that contracts do effect use of Web based information is worth the minor hassle.

Beyond the legal questions surrounding the enforceability of browse-wrap user agreements, consumers are clearly affected by the lack of uniformity seen throughout the Internet. Without a uniform standard governing how websites present notice of terms and conditions to users, a significant number of Internet users will continue to gather, use, and even distribute web based information

¹⁰⁶ *Id.* at 596.

¹⁰⁷ *Id.*

oblivious to the possible legal ramifications of their actions. Furthermore, as e-commerce expands, and more and more people utilize the Internet to purchase goods and services, the risk of users agreeing to terms of contracts of which they are not aware increases concurrently. Therefore, the days of the hidden browse-wrap agreement may be coming to an end, and an age of universal click-wrap licensing may be on the horizon.