

2015

The Evolving Doctrine of Unconscionability in Modern Electronic Contracting

Thomas Gamarello

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Law Commons](#)

Recommended Citation

Gamarello, Thomas, "The Evolving Doctrine of Unconscionability in Modern Electronic Contracting" (2015). *Law School Student Scholarship*. 647.

https://scholarship.shu.edu/student_scholarship/647

TABLE OF CONTENTS

- I. INTRODUCTION
- II. BRIEF HISTORY OF THE UNCONSCIONABILITY DOCTRINE
- III. BRIEF INTRODUCTION TO END-USER LICENSE AGREEMENTS (EULAs)
 - A. Evolution from Shrinkwrap to Clickwrap to Browsewrap
- IV. BRIEF INTRODUCTION TO CONTRACT LAW AND COURT INTERPRETATION OF EULAs
- V. HOW EULAs ARE UNCONSCIONABLE
 - A. Lack of Notice
 - B. Contracts of Adhesion and Unequal Bargaining Power
 - C. Lack of Consideration
- VI. WHAT CAN BE DONE
 - A. Line Item Clicking and More Effective Notice
 - B. Consideration for Crook Provisions
 - C. Increased Federal Oversight and Penalties
- VII. CONCLUSION

THE EVOLVING DOCTRINE OF UNCONSCIONABILITY IN MODERN ELECTRONIC CONTRACTING

Thomas Gamarello

This paper examines the evolution of the unconscionability doctrine as it applies to end-user license agreements, explores the intrinsic unconscionability of these agreements and discusses what measures can be taken to ensure the fairness, validity, and enforceability of these types of electronic contracts in the future.

I. INTRODUCTION

It's 9PM on a Wednesday. You just finished the dishes and the laundry. The kids are asleep. There's nothing on television so you decide to log onto the Internet and surf for a while before retiring. After twenty minutes of monkey videos and cat memes, you think you'll finally try out this thing co-workers have been nagging you about—Facebook. You don't have an account, a profile, a page, or whatever-it-is-that-they-call-it. It seems as though you're the only one in the office that doesn't have one. Years ago you were lured into the clutches of MySpace only to come to the realization that there are plenty of people you've met along the way you had no intention of keeping in touch with. Robert Frost once wrote "good fences make good neighbors."¹ You realize that time and distance are great fences and the advent of social networking threatens to tear them down, or, worse, render them obsolete. You think to yourself "social networking must be making poor Robert roll over in his snow-covered, less-traveled-by grave." The Internet is abuzz with snooping and PDAs (note: not the smartphone type) and oversharing and T.M.I.-ing. Basically, the whole world has become your

¹ Robert Frost, "Mending Wall," North of Boston (1914)

little sister—a nosy busybody. You said you’d never succumb again: once bitten, twice shy. However, you cave to the peer pressure like that time with the Marlboro Reds in the high school parking lot, only this time with much less coughing. You pull up the webpage and follow the on-screen instructions to create your account, profile, page or whatever-it-is-that-they-call-it, like the good 21st century cyber-lemming you are. Somewhere during this E-journey of Odysseus you come upon a page that asks you to click “I Accept” which you realize will certify that you’ve not only read the War and Peace-like tome of terms of service (the Tomes of Service?) but that you actually **agree** to them, as if you had any choice. The nerve of that Zuckerberg. And to think you actually *liked* that movie. Frustrated, you “x” out of the window and go back to the monkey videos and cat memes—after all, the only thing they ask you to do is watch them...

The above very well could be the typical narrative of the typical Internet-user on a typical Wednesday evening. Nearly 2.5 billion of the 7 billion people in the world have access to the Internet, according to the World Bank.² Of that number, about 1 billion people are already using Facebook.³ If Zuckerberg had his druthers, the remaining 4.5 billion people on the planet will have access to the Internet as well, many of whom will become users of Facebook.⁴ “Connectivity is a human right,” Zuckerberg says.⁵ That is probably overstating it, Mark. Access to potable water and shelter from the elements are rights cognizable throughout most, if not all, of the world as basic human rights—access to the Internet, social networking sites like Facebook, or monkey videos and cat memes, are not.

However, envision for a moment a future where perhaps over 90% of the world *does* have access to the Internet, as compared to the mere 35% today. Does your opinion about access to free social networking sites like Facebook change? Suppose that the radiation that cell phones emit into our brains is proven to be carcinogenic and that the new wave of communication is a luxury only the One Percent-ers can

² John Griffin, *Mark Zuckerberg’s big idea: The ‘next 5 billion people*, CNNMONEY, <http://money.cnn.com/2013/08/20/technology/social/facebook-zuckerberg-5-billion/> (August 21, 2013).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

afford; yet, at the click of a button, you could communicate with your family and friends throughout the entire world (or galaxy). How about now? Suddenly what was once a privilege starts to resemble a right, or at least a colorable right.

Now take into consideration that even today the social networking and e-communication sites of the universe control your access. You will not be allowed to use their service without expressly agreeing to *their* terms. There is no opportunity to negotiate—take it or leave it. There is also no real choice: should you choose not to accept their terms you sacrifice your ability to use their service, and, in so doing, perhaps sacrifice your only means of communicating with loved ones. There is no choice—only a Hobson’s choice. Furthermore, by accepting their terms of service, you are giving the site blanket permission to use or sell your personally identifiable information as they see fit and without any compensation to you. In layman’s terms, all of this amounts to the very essence of unconscionability—the tyranny of stronger parties, who can change the rules of the game at any time, or even take their ball and go home, while forcing weaker parties to accept the changes without any real alternative.

Electronic contracts like these are made millions of times per day, even though contract law casebooks suggest that they are probably unenforceable due to their unconscionability. In the increasingly important modern world of e-contracting, it is vital that we address these severe inequalities in bargaining power in order to ensure the enforceability of our contracts.⁶ We must ensure that both parties have an equal power to negotiate—not just one party—and that neither party is forced into a Hobson’s choice where there is no choice at all. This paper explores the unconscionability doctrine, how we arrived here, and what can be done in the future.

⁶ Encompassed in the Latin phrase *pacta sunt servanda* meaning “agreements must be kept,” the enforceability of contracts is one of the oldest and most revered aspects of society. See <http://en.wikipedia.org/wiki/Contract>, n. 4 (last visited October 18, 2013)(quoting Hans Wehberg, *Pacta Sunt Servanda*, *The American Journal of International Law*, Vol. 53, No. 4 (Oct. 1959), p.775. See also *Eli Lilly Do Brasil, Ltda. v. Federal Express Corporation*, 503 F.3d 78, 82 (2nd Cir. 2007); See also Restatement (Second) of Contracts 8 Intro. Note (1981) (“In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance...The principle of freedom of contract is itself rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affair by making legally enforceable promises.”)

II. BRIEF HISTORY OF THE UNCONSCIONABILITY DOCTRINE

While the unconscionability doctrine was not formally adopted into the American legal lexicon until the 20th century, its footprint has existed for centuries.⁷ The idea that courts should refuse to enforce grossly unfair bargains, or at least be generally suspicious of them,⁸ is nothing new, either in America law⁹ or beyond.^{10 11} Changes in the economic and social climate of the early 20th century created a glaring need for how courts can and should adjudicate extremely unfair bargains.¹² The large businesses which emerged during this time period were looking for fast, easy and standardized ways to contract, oftentimes adopting form contracts littered with numerous boilerplate provisions which were extremely favorable to the more powerful party.¹³ Such provisions were usually take it or leave it provisions, which the weaker party would almost certainly not agree to in an environment of equal bargaining power, yet were coerced into accepting because of a lack of choice.¹⁴ While the unconscionability doctrine was promulgated primarily as a protection of the unsophisticated “David” consumers

⁷ John P. Dawson, *Duress and the Fair Exchange in French and German Law*, 11 Tul. L. Rev. 345, 12 Tul. L. Rev. 42 (1937).

⁸ *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*, 227 N.W.2d 169, 180 (Iowa 1975) (quoting comment d to the *Restatement (Second) of Contracts* § 208: “Weakness in the bargaining process’ incorporates the following observation, ‘(G)ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.’”).

⁹ “If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to....” *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (quoting *Scott v. United States*, 79 U.S. (12 Wall) 443, 445, 20 L. Ed. 438 (1870)).

¹⁰ Under Roman law, which had a great impact on the development of civil law in the civil law countries such as France and Germany, the doctrine of “*laesio enormis*” allowed a party to rescind a grossly unfair land sale contract. Charles L. Knapp, Nathan M. Crystal & Harry G. Prince, *Problems in Contract Law: Cases and Materials* 584 (Aspen Publishers, 6th ed. 2007).

¹¹ Seeds of the modern unconscionability doctrine can also be seen in the legal concept from the British common law known as intrinsic fraud, a fraud which can be presumed merely from the grossly unfair contract parameters. “...[Fraud] may be apparent from the intrinsic nature of the subject of the bargain itself; such as no man in his senses and not under delusion would make.” *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Eng. 1751) (L.J. Hardwicke).

¹² Knapp, Crystal & Prince, *supra* n. 10 at 585.

¹³ *Id.*

¹⁴ *Id.*; see also *C & J Fertilizer, Inc.*, 227 N.W.2d 169.

against the “Goliath” of predatory merchants,¹⁵ it also provides a degree of protection to small businesses against the deep pockets and leverage of big businesses.¹⁶

To address contract problems like these before unconscionability was formally adopted, judges would bite the metaphorical puzzle pieces of other recognized legal doctrines, like duress and undue influence, in order to apply the doctrine to cases before them which did not absolutely conform to the black letter doctrine.¹⁷ Otherwise, if the facts did not fit the puzzles of the contract defenses exactly, judges would have had no choice but to enforce grossly unfair contracts— a cling to judicial formalism which did not make sense, nor seemed just. Unsurprisingly, this spawned concerns over judicial distortion of traditional contract law and unpredictability of judicial decision making.¹⁸ Therefore, unconscionability was codified in the Uniform Commercial Code (the “UCC”) in 1952.¹⁹ Although the UCC applies exclusively to the sale of goods moveable at the time of the contract,²⁰ the formal adoption into the UCC led to the recognition of the unconscionability doctrine in the common law,²¹ which governs contracts predominantly concerned with services, or contracts related to the sale of real estate, insurance or other intangible assets rather than goods, and in general all other types of

¹⁵ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

¹⁶ See *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*, 227 N.W.2d 169.

¹⁷ *Id.* at 175 (“The mass-produced boiler-plate ‘contracts,’ necessitated and spawned by the explosive growth of complex business transactions in a burgeoning population left courts frequently frustrated in attempting to arrive at just results by applying many of the traditional contract-construing stratagems.”). When courts adjust the prongs of other contract defenses to suit the cases before them it is known as quasi-contract defenses. “Quasi” is one of those fun legal terms like “constructive” which sound impressive but essentially mean that it is made up.

¹⁸ Knapp, *Crystal & Prince*, *supra* n. 10 at 585.

¹⁹ “(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.” U.C.C. § 2-302 (amended 2003).

²⁰ “(1) ‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action...” U.C.C. § 2-105.

²¹ “If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result,” Restatement (Second) of Contracts § 208 (1981).

contracts.²² Whether the contract concerns primarily goods or services determines whether or not the UCC or the common law applies. Of course, many contracts contain both goods *and* services. For example, when hiring a roofer to repair your roof—you pay for not only the shingles and supplies, but also for the roofer to perform the service of the repairs. Whichever predominates²³ or costs more (as an indication of which facet of the contract predominates)—the goods or the service—determines how courts decide on the choice of law.²⁴ Even though the UCC and common law are both employed to interpret and adjudicate contracts, there are differences between the two which create advantages and disadvantages depending upon the situation, like how there are two leagues in professional baseball—one league features the designated hitter and the other does not. Thus, the decision over whether or not the contract is predominantly concerned with goods or services, and which law should apply, like the decision of whether or not to start David Ortiz at first base in a National League park, is crucial and oftentimes leads to spirited debates between adversaries, judges and Monday-morning managers alike.²⁵ ²⁶

Unconscionability is one of several of what are known in contract law as contract defenses.²⁷ A contracting party can try to prove

²² Knapp, *Crystal & Prince*, *supra* n. 10 at 585; *C & J Fertilizer, Inc.*, 227 N.W.2d at 180-81 (“Adding to the probability that unconscionability will be the stated basis for refusing to enforce oppressive contracts or provisions in the future is the Uniform Commercial Code provision which permits courts to police contracts on this basis. (T)he section is an express recognition of the basic principle. Though the Code is technically applicable only to contracts for the sale of goods, its influence cannot help but be felt in other types of transactions so that most of our courts can say what they mean in refusing to enforce harsh contracts or provisions. Those who would obstruct the development of the unconscionability concept on grounds of uncertainty, indefiniteness and judicial lawmaking, must be characterized as misunderstanding the dynamic nature of the common law and statutory interpretation.”).

²³ *Princess Cruises, Inc. v. General Elec. Co.*, 143 F.3d 828, 833 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 444 (U.S. 1998).

²⁴ *Cf. Princess Cruises, Inc.; NIM Plastics Corp. v. Standex Intern. Corp.*, 11 F. Supp. 2d 1003 (N.D. Ill. 1998); *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 460 (4th Cir. 1983); *In re American Export Lines, Inc.*, 620 F. Supp. 490, 515 (S.D.N.Y. 1985).

²⁵ Not to mention these debates are popular hypothetical case questions featured on many Contracts exams for first-year law students.

²⁶ Of course, if the opposing starting pitcher is left-handed, “Big Papi” is probably best relegated to a potential late-inning, pinch-hitter role, since, in his career, he is not only a subpar fielder but also a left-handed hitter whose career batting average and on-base-plus-slugging percentage is significantly lower against left-handed starting pitchers. <http://www.baseball-reference.com/players/o/ortizda01.shtml>, (last visited October 23, 2013).

²⁷ 1 Williston on Contracts § 1:1 (4th ed.).

unconscionability like other contract defenses, such as duress, undue influence, fraud and misrepresentation, in order to escape liability or to avoid enforcement of a contract.²⁸ In order to prove unconscionability, in most jurisdictions a party must prove procedural and substantive unconscionability.²⁹ A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract.³⁰

Procedural unconscionability is understood as the disadvantage in bargaining power suffered by the weaker party in the formation of the contract, and, if present, will occur in the time period up to when the contract is formed.³¹ This includes so called “take it or leave it” contracts, better known as contracts of adhesion. These contracts by their very nature indicate that there is extreme inequality in bargaining power between the contracting parties.³² Procedurally unconscionable

²⁸ “Parties are generally free to contract as they wish, and courts will enforce contracts according to their plain meaning, unless induced by [contract defenses like] fraud, duress, or undue influence.” *Cordry v. Vanderbilt Mortg. & Finance, Inc.*, 445 F.3d 1106, 1110 (8th Cir. 2006) (*quoting Util. Serv. & Maint., Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910, 913 (Mo. Banc 2005)).

²⁹ *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1746 (U.S. 2011) (“A finding of unconscionability requires “a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.”); See also *Summers v. Crestview Apartments*, 2010 MT 164, 357 Mont. 123, 236 P.3d 586 (2010) (“Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.”); see also *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640 (W. Va. 2012) (“A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in allocation of risks to the weaker party; but *gross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party*, may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, no real alternative, or did not in fact assent or appear to assent to the unfair terms.”) (emphasis added).

³⁰ *State ex rel. AT & T Mobility, LLC v. Wilson*, 703 S.E.2d 543 (2010).

³¹ See, e.g. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); See also *C&J Fertilizer, Inc. v. Allied Mutual Insurance Co.*, 227 N.W.2d 169 (Iowa 1975); *Tunkl v. The Regents of the University of California*, 60 Cal.2d 92 (1963); *The Original Great American Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir.1992); *Summers v. Crestview Apartments*, 2010 MT 164 (2010).

³² *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 736 S.E.2d 91 (W. Va. 2012) (“A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable, or beyond the reasonable expectations of an ordinary person.”).

contracts involve oppression by the dominant party and usually surprise by the subservient party due to unequal bargaining power.³³

Substantive unconscionability is the unfairness of the actual terms of the contract alone.³⁴ A term is substantively unconscionable where it is one-sided or overly harsh,³⁵ shocking to the conscience, monstrously harsh, or exceedingly calloused.³⁶ It also pertains to situations where important terms are hidden in a maze of fine print or legalese.³⁷ Sometimes just the presence alone of an extremely one-sided passage or clause can lead to the inference that the passage or clause, or even the entire contract in question is unconscionable.³⁸ Unlike procedural unconscionability, substantive unconscionability can only occur during the time period of the creation of the contract.

However, if the terms “shock the conscience” to the point where no reasonable person would ever had agreed to them, there may not need to be substantive unconscionability to pair with the procedural unconscionability, as the overwhelming nature of the procedural unconscionability may be sufficient.³⁹ However, the opposite is not true, i.e. you cannot prove unconscionability by only proving substantive unconscionability.

The legal doctrine of unconscionability is a judge-centered doctrine, meaning it is judges and not juries that make the determination as to whether or not a contract is unconscionable. The party asserting the unconscionability has the burden of proof. Once a determination of unconscionability has been made, courts have a few options—they may

³³ AT&T Mobility LLC, 131 S.Ct. at 1746.

³⁴ E.g. Gandee v. LDL Freedom Enterprises, Inc., 293 P.3d 1197 (Wash. 2013); Williams, 350 F.2d 445; C&J Fertilizer, Inc., 227 N.W.2d 169; Tunkl, 60 Cal.2d 92; The Original Great American Chocolate Chip Cookie Co., Inc., 970 F.2d 273, 281; Summers, 2010 MT 164 (2010); Grayiel, 736 S.E.2d 91.

³⁵ AT&T Mobility LLC, 131 S.Ct. at 1746.

³⁶ Gandee, 293 P.3d 1197 (Wash. 2013)

³⁷ AT&T Mobility LLC, 131 S.Ct. at 1746.

³⁸ Original Great American Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 281 (7th Cir.) (“The doctrine of unconscionability, closely allied as it is to fraud and duress, is designed to prevent overreaching at the contract-formation stage. The presence of a commercially unreasonable term, in the sense of a term that no one in his right mind would have agreed to, can be relevant to drawing an inference of unconscionability but cannot be equated to it.”)

³⁹ Cf. Williams at 450 (“But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms”).

not enforce the entire contract, sever the unconscionable portion of the contract and enforce the rest, or limit a provision's application.⁴⁰ Embedded also in the principle is what has been coined the doctrine of reasonable expectations.⁴¹ In situations where there is a contract of adhesion (i.e. a procedurally unconscionable contract) courts may look to the reasonable expectations of the parties and interpret any non-bargained for terms according to the reasonable expectations of the non-drafting party.⁴²

As mentioned above, unconscionability is a recognized contract defense in the sale of goods, in the sale of services and in general all other types of contracts. While not apparently clear, included in the "all other types of contracts" are contracts for electronic information, which have their own unique distinction since electronic information is not a "good" as defined under the UCC (for example, electronic information is not a good movable at the time of the contract) nor is it primarily a service which would place it under the penumbra of the common law.

As a result of these emerging transactions in the digital world, the National Conference of Commissioners on Uniform State Laws (the "NCCUSL," now known as the Uniform Law Commission or the "ULC") promulgated the Uniform Computer Information Transactions Act ("UCITA") in 1999, and further amended it in 2000 and 2002, to address these shortcomings in the UCC.⁴³ UCITA was a drafted state law, proposed for inclusion under section 2B of the UCC, and intended to create a useable and uniform set of rules to govern transactions related to computer information. In particular, UCITA attempted to codify rules regarding end-user license agreements (EULAs) such as shrinkwraps, clickwraps and browserwraps. In fact, UCITA was at least partially borne by the failed attempts to modify the UCC to validate shrinkwrap contracts.⁴⁴ UCITA generally validated the usage of all EULAs, as long

⁴⁰ *Gandee v. LDL Freedom Enterprises, Inc.*, 293 P.3d 1197 (Wash. 2013).

⁴¹ See *C&J Fertilizer, Inc.*, 227 N.W.2d 169.

⁴² See *Id.*

⁴³ Uniform Law Commission, Computer Information Transactions Act Summary, <http://www.uniformlaws.org/ActSummary.aspx?title=Computer%20Information%20Transactions%20Act>, (last visited October 23, 2013).

⁴⁴ Margaret Jane Radin, *Humans, Computers and Binding Commitment*, 75 Ind. L.J. 1125, 1140 (Fall 2000).

as the user was given an opportunity to return the goods (at the seller's expense) if the license terms were found to be objectionable. As of the date of this writing, UCITA has only been adopted in two states—Virginia and Maryland—despite attempts in other states.⁴⁵

III. BRIEF INTRODUCTION TO END-USER LICENSE AGREEMENTS (EULAs)

A. Evolution from Shrinkwrap to Clickwrap to Browsewrap

Like radiation from cell phones and microwaves, many computer users have already been exposed to EULAs without probably even realizing it. They have their own taxonomy and have added new words into the legal and computer science lexicon—namely shrinkwrap, clickwrap and browsewrap.

Shrinkwraps are EULAs that are included in the package with the product that is purchased online and which the end-user does not have a chance to review until he or she receives the box shipped to his or her door.⁴⁶ A shrinkwrap end-user license agreement typically involves (1) notice of a license agreement on product packaging, (2) presentation of the full license on documents inside the package, and (3) prohibited access to the product without an express indication of acceptance.⁴⁷ Generally, in the shrinkwrap context, the consumer does not accept the shrinkwrap terms at the time of purchase; instead, the consumer manifests assent to the terms by later actions.⁴⁸ If this seems somewhat strange, it is: in normal contract situations, purchasers are afforded the opportunity to negotiate the terms of the contract prior to paying the seller, at least in theory (how many consumers haggle with the Home Depot salesperson about arbitration and indemnification clauses?). The term shrinkwrap comes from the fact that software packages are usually

⁴⁵ UCITA, http://en.wikipedia.org/wiki/Uniform_Computer_Information_Transactions_Act, (last visited October 23, 2013).

⁴⁶ *Id.* at 1134.

⁴⁷ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428 (2nd Cir. 2004).

⁴⁸ *Id.*

covered in cellophane “shrinkwrap” and that some vendors have written end-user licenses that become effective as soon as the customer tears the cellophane from the package.⁴⁹

Clickwraps are the most common EULA that users have encountered. They are the Tolstoy-esque, laundry list of terms that appear when one tries to open an online account or begin an online service—they are the primary means of forming contracts online.⁵⁰ Moreover, they are standardized, mass-market contracts promulgated by service providers to reduce transaction costs.⁵¹ As the name suggests, clickwraps require the user to click a button to manifest assent to the terms of the contract.⁵² Sometimes, instead of a dialog box or a pop-up window opening with the actual terms of service, the website will post an embedded hyperlink which will require you to follow the link separately, and then acknowledge that you have read and agree to the terms of the contract by clicking “I Accept.” Furthermore, when a website uses a clickwrap agreement, the end-user is forced to make a decision whether or not to accept the website’s term of service before being granted access to the site.⁵³

Browsewraps are essentially an attenuated type of clickwrap agreement—they involve the same laundry list of terms but require the end-user to do less work. Typically with websites employing the usage of browsewraps, the terms of service will be embedded as a hyperlink in a prominent place somewhere on the page.⁵⁴ However, browsewraps do not require the consumer to do anything other than continue to use the website, an example of a contract accepted by performance.⁵⁵ Unlike clickwrap agreements, browsewrap agreements “[do] not require the user to manifest assent to the terms and conditions expressly...[a] party

⁴⁹ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

⁵⁰ *Id.* (“On the internet, the primary means of forming a contract are the so-called “clickwrap” (or “click-through”) agreements, in which website users typically click an “I agree” box after being presented with a list of terms and conditions of use”).

⁵¹ Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459 (December 2006).

⁵² *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 593-94 (S.D.N.Y. 2001), *aff’d* 306 F.3d 17 (2d Cir. 2004).

⁵³ *Register.com, Inc.*, 356 F.3d at 429.

⁵⁴ *Kwan v. Clearwire Corp.*, No. C09-1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012).

⁵⁵ *Id.*

instead gives his assent simply by using the website.”⁵⁶ One does not even need to read the terms of service (which is often the case).⁵⁷

VI. BRIEF INTRODUCTION TO CONTRACT LAW AND COURT INTERPRETATION OF EULAs

Contract law is designed to protect the expectations of the contracting parties.⁵⁸ A contract is “a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.”⁵⁹ In contract law, binding legal contracts are comprised of three essential elements: offer, acceptance and consideration.⁶⁰ All three terms are legal terms of art. An offer is “a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for promise or its performance”⁶¹ and an acceptance is a “manifestation of assent,”⁶² a consent between two parties involving an affirmative action to do something rather than passive acquiescence in accepting something.⁶³ Consideration is each party providing something of value which induces the other party to enter the contract agreement.⁶⁴ In most contracts, the consideration is currency; however, it can be anything of value, like a promise to do or *not* to do something.

In general, the waters surrounding the validity of EULAs are murky. Courts are concerned with the element of acceptance,⁶⁵ and whether or not the user had notice of the agreement and assented to it.⁶⁶

⁵⁶ Hines, 668 F.Supp.2d at 366-67 (quoting Southwest Airlines Co. v. BoardFirst, L.L.C., No. 06-CV-0891-B, 2007 WL 4823761 at *4 (N.D.Tex. September 12, 2007).

⁵⁷ Specht, 150 F.Supp.2d at 594.

⁵⁸ 1 Williston on Contracts § 1:1 (4th ed.).

⁵⁹ Restatement (Second) of Contracts § 1.

⁶⁰ Cf. Banning Co. v. People of State of Cal., 240 U.S. 142 (1916); Minster Farms Coop. Exchange Co., Inc. v. Meyer, 884 N.E.2d 1056 (2008).

⁶¹ Interstate Industries, Inc. v. Barclay Industries, Inc., 540 F.2d 868, 871 (7th Cir. 1976).

⁶² Id.

⁶³ Radin, Humans, Computers and Binding Commitment, 75 Ind. L.J. at 1125.

⁶⁴ 17A Am. Jur. 2d Contracts § 102 (2d ed., database updated August 2013).

⁶⁵ Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002).

⁶⁶ Major v. McCallister, 302 S.W.3d 227 (Mo. Ct. App. S.D. 2009).

Did the end-user at the time of the contract have sufficient information about the bargain he or she was making to have manifested a valid, legal assent to it, or was the end-user railroaded or swindled into doing so? In dicta, then Judge Sotomayor, sitting on the bench of the United States Court of Appeals for the Second Circuit, wrote in her majority opinion that “a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms.”⁶⁷ This question has more teeth under the proposed UCITA, since UCITA relaxes the traditional legal definition of acceptance to encumber mere passive assent rather than affirmative manifestation of assent.⁶⁸ Recall that the unconscionability doctrine is concerned with stronger parties exploiting their extremely powerful bargaining position to bully weaker parties into accepting terms they would not otherwise have agreed to, and also with stronger parties swindling weaker parties to sign contracts with extremely one-sided terms hidden like Waldo in the middle of fine print.⁶⁹ Therefore, acceptance becomes an important question when considering EULAs under general contract legal theory.

In most circumstances, shrinkwraps and clickwraps are more likely to be upheld than browsewraps;⁷⁰ however, there has been much debate as to the validity and enforceability of EULAs in general.⁷¹ Whereas courts traditionally applied the unconscionability doctrine to contracts which were extremely one-sided, courts now apply the doctrine with increasing frequency to strike down contracts that were promulgated using unfair procedures and which contain unfair provisions.⁷² Many courts have found that EULAs are enforceable as long as their terms are reasonable and are not objectionable on any other contract grounds,⁷³ such as unconscionability.⁷⁴ An area of primary

⁶⁷ *Specht*, at 39.

⁶⁸ Radin, *Humans, Computers and Binding Commitment*, 75 *Ind. L.J.* at 1141-42.

⁶⁹ Section II, *supra*.

⁷⁰ Mark A. Lemley, *Terms of Use*, 91 *Minn. L. Rev.* 459 (December 2006).

⁷¹ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Kwan*, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012); *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 593-94 (S.D.N.Y. 2001), *aff'd* 306 F.3d 17 (2d Cir. 2004); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428 (2d Cir. 2004).

⁷² E. Allan Farnsworth, *Contracts* § 4.27 (2d ed. 1990).

⁷³ *ProCD, Inc.*, 86 F.3d 1447 (1996).

concern is whether or not the user had reasonable notice of the agreement and was actually able to manifest assent to it.⁷⁵ In the contract world, contracts are often modified by one of the contracting parties in return for increased consideration. With EULAs, the stronger party may sometimes unilaterally change the terms of the agreement prior to payment or performance by the weaker party. In these situations courts have held the EULA to be unenforceable.⁷⁶ Another concern is whether or not the agreement adequately informed the consumer of their right to reject the contract and the method of rejection. Without knowing the escape to an unusually one-sided contract that the consumer ordinarily would not have entered, the consumer may feel that he or she has no choice but to enter the contract.⁷⁷

In the case of shrinkwrap agreements, courts will generally uphold the validity of the contract as long as the end-user had adequate time to return the product upon receiving it with the terms of service.⁷⁸ Courts tend not to find shrinkwrap EULAs unconscionable merely because the buyer did not have a chance to review the terms of service prior to purchasing the product and opening the package.⁷⁹ One of the first major decisions to announce the validity of shrinkwraps was the ProCD v. Zeidenberg case—a controversial case that would impact the way that courts review end-user license agreements.⁸⁰ Matt Zeidenberg, a graduate student, purchased software on CD-ROM from ProCD at their non-commercial price. To recoup the investment costs of creating the software, ProCD charged two different prices depending upon the users intended usage: non-commercial or commercial. Zeidenberg began selling the software to others online for a fee cheaper than the commercial version. ProCD sued him for violations of its license agreement, which was included in the package as a shrinkwrap agreement.⁸¹ Judge Easterbrook, a famous judge and economist sitting

⁷⁴ Id. at 1449.

⁷⁵ See Specht.

⁷⁶ Saver v. Wyse Technology, 939 F.2d 91, 15 U.C.C. Rep. Serv. 2d 1 (3d Cir. 1991).

⁷⁷ DeFontes v. Dell, 984 A.2d 1061 (R.I. 2009).

⁷⁸ Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); Meridian Project Systems, Inc. v. Hardin Const. Co., LLC, 426 F. Supp. 2d 1101 (E.D. Cal 2006).

⁷⁹ ProCD, Inc., 86 F.3d 1447 (1996).

⁸⁰ Id.

⁸¹ In addition, once he loaded the CD-ROM onto his machine, a dialog box opened up which required him to click on it to accept. This is another form of EULA—the clickwrap.

on the bench of the United States Court of Appeals for the Seventh Circuit, concluded that in most circumstances, shrinkwrap licenses should be enforced, as long as the consumer *could* return the product for a refund after being given a chance to review the terms.⁸² In Easterbrook's mind as long as the end-user had the option to return the product upon review of the terms of service (without even actual proof that the end-user did read the terms, which, in this case, there was evidence to suggest that Zeidenberg did not read the terms), it was sufficient to conclude that the end-user was not forced to accept the terms of the contract and, thus, the contract would be validly binding and enforced.⁸³ Other courts have followed suit and found constructive end-user acceptance of the terms of contracts merely since the users do not return the products upon review of the terms of service—the same kind of tacit acceptance of the terms of service construed by performance as was present in ProCD.⁸⁴

Clickwraps are different from shrinkwraps in that there is a requirement that the end-user click the “I Accept” button in order to manifest assent.⁸⁵ Essentially the same principles above are applicable in the case of clickwrap contracts—if the end-user has the ability to scroll through the additional terms prior to clicking “I Accept,” then there is sufficient notice and the clickwrap is deemed valid.⁸⁶ However, due to the take-it-or-leave-it nature of clickwrap agreements rather than the meeting-of-the-minds bargaining in offline contracting, the notion of assent is attenuated.⁸⁷

⁸² Id.

⁸³ Id.

⁸⁴ Cf. Bowers v. Baystate Technologies, Inc., 320 F.3d 1317, 1325 (Fed.Cir. 2003); Morgan Laboratories Inc. v. Micro Data Base Systems, Inc., No. C96-3998 THE, 1997 WL 258886 (N.D. Cal. Jan. 22, 1997); Adobe Systems, Inc. v. Stargate Software Inc., 216 F. Supp. 2d 1051, 48 U.C.C. Rep. Serv. 2d 489 (N.D. Cal 2002).

⁸⁵ Specht v. Netscape Communications Corp., 150 F.Supp.2d 585, 593-94 (S.D.N.Y. 2001) aff'd 306 F.3d 17 (2d Cir. 2004).

⁸⁶ Cf. ProCD, 86 F.3d 1447 (1996); iLan Systems, Inc. v. Netscout Service Level Corp., 183 F. Supp. 2d 32, 338 (D. Mass. 2002) (“[the party to the contract] explicitly accepted the clickwrap license agreement when it clicked on the box stating ‘I Agree’”); Caspi v. Microsoft Network, L.L.C., 323 N.J. Super. 118, 732 A.2d 528 (App. Div. 1999); Feldman v. Google, Inc., 513 F.Supp.2d 229 (E.D.Pa. 2007); In re RealNetworks, Inc. Privacy Litigation, No. 00-1366, 2000 WL 631341 (D. Ill. May 8, 2000); Hotmail Corp. v. Van\$ Money Pie, No. 98-20064, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998)

⁸⁷ Mark A. Lemley, Terms of Use, 91 Minn. L. Rev. 459, 466 (December 2006).

Browsewraps expand on the theory of performance as acceptance introduced as a result of the promulgation of shrinkwraps.⁸⁸ If one continues to use the website, even if there is no “I Accept” box to click to manifest one’s assent, one is considered to have tacitly accepted the terms of service of the website by continuing to use it.⁸⁹ Courts, however, have a more difficult time interpreting the validity of browsewrap agreements and whether or not they should be enforceable. The name of the game is acceptance—browsewrap agreements by their very nature create questions as to whether the end-user has actual or constructive notice of the license agreement and whether the end-user has accepted them.⁹⁰ Courts that have refused to enforce browsewraps have done so in order to protect the consumer, and, conversely, when they have been enforced, it has been against commercial entities.⁹¹ While this paper is primarily concerned with the plight of the individual end-user and because courts are more likely to flex their muscles to protect ordinary citizens as justice requires, the concept of manifesting assent through performance in this method, is concerning to businesses as well. While large corporations will presumably have safeguards in place to prevent

V. HOW EULAs ARE UNCONSCIONABLE

EULAs are both procedurally and substantively unconscionable by their very nature. The Kings of the Service Provider Realm routinely exploit their feudal positions and regal bargaining powers to craft harsh and extremely one-sided Terms of Service contracts which serfs are forced into accepting. Feudal resistance is futile. The Kings rule from the throne by decree without having to provide meaningful notice to the serfs of the terms. The decrees in and of themselves are contracts of adhesion—users, like serfs, have no real options but to accept the terms or not use the service. Worse, the Kings sometimes act the jester to

⁸⁸ Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004).

⁸⁹ Id.

⁹⁰ Kwan, 2012 WL 32380 at *7.

⁹¹ Lemley, Terms of Use, 91 Minn. L. Rev. 459.

swindle the serfs by hiding harsh terms somewhere in the contract and profiting from them in ways never even contemplated by the serfs (as if there was a choice). Further, even if serfs are advised of altered terms in the contract, the Crown provides no additional compensation or consideration. Kings like Facebook and Twitter wield unchecked power and create their own kingdoms and laws of the land. As Mel Brooks astutely observed, it's good to be the king.⁹²

But feudal times have passed—today, such unconscionable tactics are no longer tolerated in the realm of ordinary contract law. No longer should they be tolerated in the realm of online contracting either.

A. Lack of Notice

Without adequate notice to the user of changes in the terms of a contract, how can it truly be said that the user has agreed to the changes? If the user has not agreed to the changes of the contract, how can the contract be considered binding? While face-to-face contracts formed in such an unconscionable manner would be deemed unenforceable, this is a routine occurrence in the online contracting world. For proof, all the reader needs to do is compare the Terms of Service when his or her account was created on whatever social media site he or she belongs to with the Terms of Service now. Chances are the site may have sent out a notice, either via electronic mail or a posting on the site home page when the changes were made, but, the truth is, it probably would not have made any difference. The user probably deleted the spam from his or her inbox and hurriedly bypassed the posting on the home page to look at pictures of pets in Halloween costumes. And this is exactly what the party that promulgated the notice wanted—getting away with extremely one-sided terms in a contract is much easier if the other party has not even read it.⁹³

⁹² HISTORY OF THE WORLD, PART 1 (20th Century Fox 1981).

⁹³ See Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. Cin. L. Rev. 1327, 1342, n. 74 (Summer 2011). A study conducted by New York University found that “only about one or two in one thousand shoppers” of software access a product's EULA for at least one second. As evidence, the study cites news of a computer game retailer that included a clause in its online contract that gave it a right to the “souls” of 7,500 of its online customers. The customers had the option of nullifying the soul-claiming clause but very few did so. While contracts of adhesion are egregious,

Further highlighting the lack of meaningful notice, even users who set aside the weekend (or two) it takes to read the terms of service may not even notice the unfavorable or one-sided terms. By crafting “tomes” of service dozens of pages long, service providers can instruct their lawyers to be unabashedly one-sided, while shrewdly hiding behind the veil of thoroughness and security. The results are incredibly verbose contracts that would strain the focus of parties used to these sorts of writings, such as lawyers, editors and other sadists. It might as well be the contract that Charlie Bucket signed to gain access to the Chocolate Factory.⁹⁴ This problem is further accentuated in the virtual world. In the real world, the drafters have to pay for the contract to be printed. While this may seem *de minimis* in individual instances, in the case of mass-market contracts (which is what EULAs are), drafters exert much effort into keeping the contract lengths to a minimum because of printing costs. Therefore, drafters have to balance out the need for thoroughness, security, and inclusion of all sorts of favorable terms with the necessity of keeping operating costs down. In the virtual world this is not a problem—there is no page limit.

Furthermore, by making the contract longer you increase the likelihood that the other party is not going to even bother reading it. This makes it more likely that service providers can get away with hiding unfavorable or one-sided terms in the middle of long sections or paragraphs. This is the unconscionable trickery that many service providers employ to include so-called “crook provisions” into their contracts.⁹⁵ A crook provision is the term Nancy Kim coined for unbargained for provisions which lead to increased revenue for the dominant party which the user is usually unaware of, and probably

they are dealing with access to computer software. Hiding property (intellectual property?) claims to one’s soul (soul-squatting?) in the terms of service is arguably the ultimate unconscionable provision.

⁹⁴ WILLY WONKA & THE CHOCOLATE FACTORY (Paramount Pictures 1971). The font size in the contract Charlie signs famously gets smaller and smaller until it is no longer readable. Grandpa Joe was not a lawyer, nor was one offered to him by Willy Wonka, but had Charlie retained counsel, it is extremely doubtful that the contract would have been enforceable, as contract defenses such as unconscionability, duress, undue influence and misrepresentation abound...

⁹⁵ Terms of Service: Didn’t Read is a user rights initiative website that review Terms of Service provisions for unfair terms and crook provisions. Their motto is “I have read and agree to the Terms’ is the biggest lie on the web. We aim to fix that.” The website reviews the Terms of Service of various websites and assign ratings to their Terms of Service—Class A being good to one extreme and Class E being bad to the other. TERMS OF SERVICE; DIDN’T READ, <http://tosdr.org/>, (last visited December 4, 2013).

would not have consented to if he or she had been aware.⁹⁶ These ninja-like provisions are often un-related to the product at all,⁹⁷ and afford the issuer access to completely new revenue streams.⁹⁸ ⁹⁹ Even where ordinary contracts of adhesion reduce the value of the bargain to the consumer by limiting warranties and including certain exclusions, they typically do not seek to extract additional benefits from consumers that were not related to the substance of the original transaction without the consumer actually manifesting assent to it.¹⁰⁰ The example that Kim uses is the hotel that charges an additional fee for late check-outs and requires the customer to separately initial the rate and late check-out fee.¹⁰¹ At least in this scenario the customer is aware of the extra charge. With crook provisions in EULAs, the customer is normally unaware. Because of judicial recognition of the acceptability of certain shrinkwraps, clickwraps and browswraps, and because companies are no longer constrained by the prospects of high printing costs in a virtual

⁹⁶ Kim, *Contract's Adaptation and the Online Bargain*. Prior to shrinkwraps, clickwraps and browswraps, Kim describes contracts as containing primarily "shield" and "sword" provisions. "Shield" provisions refer to those that serve to limit liability; "sword" provisions refer to those that affirmatively terminate the rights of another party. Crook provisions have opened up a Pandora's Box of unfavorable contract terms.

⁹⁷ *Id.* at 1344.

⁹⁸ For a great example of a recent crook provision, in December 2012, Instagram announced they were changing their terms of service effective January 16, to include the following: "A business or other entity may pay" Instagram to display users' photos and other details "in connection with paid or sponsored content or promotions, without any compensation to you." They further altered the provision whereby the user grants a "limited license" to Instagram to use their content. In the new term, Instagram makes this limited license a "sub-licensable" agreement, clearing the way for Instagram to sell your pictures to retail stores for use in promotions without any compensation to the user. Julianne Pepitone, *Instagram can now sell your photos for ads*, CNNMONEY, http://money.cnn.com/2012/12/18/technology/social/instagram-sell-photos/index.html?iid=s_mpm#comments (December 18, 2012).

⁹⁹ Examples of other crook provisions from various Terms of Service: Google can share user personal information with third parties; SoundCloud can disclose user personal information in case of business transfer or insolvency; the copyright license the user grants Youtube is worldwide, non-exclusive and royalty-free which is sublicenseable and transferable, and can be used without limitation for promotion of the service in any media format with Youtube or any of its successors and affiliates; GitHub requires the user to defend and indemnify GitHub against any claims, demands, suits or proceedings made regarding the user's uploaded content (this is a crook provision as it is doubtful the user knows of its presence in the Terms of Service and because GitHub avoids the costs of suit); the copyright license entitles Twitpic to distribute user content to media entities; Delicious can license user content to third-parties; Amazon will track users on other websites, enables third-party advertisers to target users, and Amazon may sell user data as part of a business transfer; Netflix reserves the right to disclose personal info without notification; users grant Spotify perpetual licenses to any published media. TERMS OF SERVICE; DIDN'T READ, <http://tosdr.org/>, (last visited December 4, 2013).

¹⁰⁰ *Id.* at 1343.

¹⁰¹ *Id.*

world, companies are emboldened to include these types of crook provisions in their Terms of Service. The browsewrap of one social networking site gives the owners of the site an “irrevocable, perpetual, nonexclusive, fully-paid and worldwide license” to user content,¹⁰² a provision that a user probably would have had an issue with had he or she actually read the contract, at least not without additional consideration.¹⁰³ EULAs are unconscionable when service providers hide these “crook” provisions, or other equally extremely one-sided terms in the contract. The user does not have notice—adequate or otherwise—of the provisions, and therefore cannot manifest a legally-binding assent. In the same way, some service providers require the user to remain abreast of changes to the Terms of Service, and have eschewed responsibility to affirmatively notify users of material changes to the agreement altogether, shifting the burden to the user to remain aware of changes they did not make and did not assent to.

B. Contracts of Adhesion and Unequal Bargaining Power

Unconscionability occurs in scenarios where one party exercises its extreme bargaining power over the weaker party and presents the other party with take-it-or-leave-it contracts of adhesion.¹⁰⁴ Contracts of adhesion by their very nature are presumptively unconscionable because had the parties been more equal the terms would not be nearly as one-sided.¹⁰⁵ Large companies regularly use their superior bargaining power to tip the contracting scales in their favor. Part of the reality of doing business is that there is often this kind of inequality in the course of dealings. Like chip leaders at the poker table, superior parties often dictate the action and, sometimes, bully the weaker parties. It is one of the spoils of being the chip leader in the industry. It is when the weaker party is forced to accept an exceptionally one-sided contract or set of

¹⁰² *Id.* at 1342 (referring to *Friendster's Terms of Service* [See *Friendster Terms of Service*, <http://www.friendster.com/info/tos.php> (last visited Jan. 16, 2011)]).

¹⁰³ Section VI(C), *infra*.

¹⁰⁴ Section VI(C), *infra*.

¹⁰⁵ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); Cf. *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 736 S.E.2d 91 (W.Va. 2012); *C&J Fertilizer, Inc. v. Allied Mutual Insurance Co.*, 227 N.W.2d 169 (Iowa 1975).

terms that is exceptionally one-sided that the contract approaches unconscionability.

By way of illustration, consider when a consumer purchases a car from a dealership. The consumer knows (or should know) that the cost of the car to the dealership is considerably less than he or she is paying for it. The consumer also knows about the destination charges and the other fees the dealership adds. These are terms that tip the scale in favor of the dealership yet, while one-sided, probably do not rise to the level of unconscionability. If, however, the dealership added contract language that stated that the purchaser must have all service on the vehicle for the lifetime of the car performed at the dealership or else face a five hundred dollar fine per occurrence, the contract would speed towards the unconscionability threshold. Yet, even in this scenario, the consumer could go to another dealership, as no reasonable person would accept such a ridiculous provision. However, suppose the dealership was the only dealership around for hundreds of miles, precluding the purchaser from any other reasonable options, or that the dealership hid those terms in a long, verbose contract, the contract would clearly be a contract of adhesion and quickly speed pass the threshold into unconscionability.

As referenced in the fictional narrative in the Introduction, while using social media is probably not a right, in a future where it may be the quickest, cheapest, and perhaps only way to communicate with family or loved-ones, especially considering the exponential growth rate of social media sites like Facebook, Google+, YouTube, Pinterest, LinkedIn and Twitter,¹⁰⁶ and the increasing costs of cellular phones and data plans, the black and white answers becomes increasingly grey. These large service providers are essentially the only car dealerships around for hundreds of miles; they accordingly assume a position of superior bargaining power at the contracting table. Unequal bargaining power is a hallmark of procedurally unconscionable contracts. Armed with the knowledge that the user will ultimately accept whatever contract is put before him or her by clicking or browsing, and because most social media websites are free to the consumer, service providers can easily exploit their superior bargaining power to tip the scale extremely in their own favor.

¹⁰⁶ *12 Awesome Social Media Facts and Statistics for 2013*, JeffBullas.com (last visited November 9, 2013).

C. Lack of Consideration

In the world of contracting outside of EULAs,¹⁰⁷ additional terms which materially change the nature of the original contract normally have to be supported by additional consideration.¹⁰⁸ Furthermore, the modification of an existing contract cannot be done unilaterally by one party—both parties must assent to the modification of terms in order for the modification to be incorporated into the contract.¹⁰⁹ This is not the case with EULAs. In fact, one recent case found that a browsewrap agreement that contained a provision which allowed for unilateral changes to the Terms of Service by the service provider was unenforceable.¹¹⁰ Service providers routinely change the Terms of Service agreements without additional consideration to the user. In fact, even though courts have held that the user will not be bound to changes in the Terms of Service if the website does not notify the user of them,¹¹¹ some service providers get around this by advising the user only that a change has occurred. The service provider then requires the user to reconnoiter for the changes in the Terms of Service, or, in the alternative, simply continue to use the website in order to manifest assent. This of course is the sketchy browsewrap practice of performance as acceptance. For an example, consider this excerpt from the first line of Yahoo's Terms of Service: "Yahoo! Inc. ("Yahoo") welcomes you. Yahoo provides the Yahoo Services (defined below) to you subject to the following Terms of Service ("TOS"), which may be

¹⁰⁷ And contracting situations other than those between two merchants, as such situations involve interpretation of the UCC: "modifications of contracts under the UCC need not be supported by additional consideration as long as the modifications are done in good faith." See U.C.C. § 2-209 cmt 1. (amended 2003). Usually this is because of some frustration of purpose or occurrence of an reasonably unforeseen event which makes the modification to the contract necessary in order to preserve its value. An example of this type of event is an Act of God, such as a tornado in an area of the country where it is not reasonable to have such weather, which in turn adversely affects the terms of a contract. If the tornado occurred in Kansas it could be hardly be characterized as unforeseen, as compared to if the tornado occurred in Newark, New Jersey.

¹⁰⁸ *Volvo Const. Equipment North America, Inc. v. CLM Equipment Company, Inc.*, 386 F.3d 581, 598 (4th Cir. 2004).

¹⁰⁹ *Baptist Physician Hosp. Organization, Inc. v. Humana Military Healthcare Services, Inc.*, 415 F. Supp. 2d 835 (E.D. Tenn. 2006), order aff'd, 481 F.3d 337, 2007 FED App. 0107P (6th Cir. 2007) (applying Tenn. law).

¹¹⁰ *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F.Supp.2d 1058 (D.Nev. 2012).

¹¹¹ *Douglas, et al. v. U.S. Dist. Court for the Central Dist. Of Cal.*, 495 F.3d 1062 (9th Cir. 2007), cert. denied, 552 U.S. 1242 (2008).

updated by us from time to time without notice to you...*By accessing and using the Yahoo Services, you accept and agree to be bound by the terms and provision of the TOS*" (emphasis added).¹¹² Yahoo does not even notify the user of the actual changes to the terms. Further, Yahoo only requires the user to continue using its services to manifest assent to changes that the user did not even have to realize were made with any level of substantive particularity in the first place. The laws of contracts require that there be additional consideration from both sides to actually demonstrate the change was valid and legally binding¹¹³—how can this be done when one party acts unilaterally without any additional consideration to the other side? Where is the acceptance?

VI. WHAT CAN BE DONE

A. Line-item Clicking and More Effective Notice

If a company wishing to engage in online contracting was required to make all paragraphs or sections clickable, that is, consentable by a click of the mouse, it would go a long way towards manifesting a legally-binding assent to the EULA. Either the user agrees to the terms and clicks it, thereby incorporating it into the contract, or the section gets thrown out, shifting the burden to the drafter to reach out to the consumer for further discussion. Only if the company reaches out to the consumer and both parties agree will the rejected terms have any possibility of being reincorporated into the contract. Companies complaining about the potential expense of increasing the size of its customer service department can be told that either it's the cost of doing business or remove all unreasonable terms from their contracts.

The same result can be achieved even if the user is not required to click and assent to *all* sections, but only *some* sections. Perhaps a portion of the EULA is predetermined and any further provisions are made clickable. The predetermined portions could be anything from adoption of the default terms of contracts from the UCC or newly-minted

¹¹² Yahoo Terms of Service (last updated March 16, 2012), available at <http://info.yahoo.com/legal/us/yahoo/utos/terms/>.

¹¹³ *Volvo Const. Equipment*, 386 F.3d at 598.

terms agreed upon by consumer advocacy groups, scholars, ALI,¹¹⁴ contract law professors, lobbyists and adopted into state law (following the footsteps of UCITA but hopefully with a better than two-out-of-fifty-state outcome). In either of these scenarios, even the biggest skeptic who says that users will mindlessly click through the sections¹¹⁵ or skip through the line-item assent process altogether in an effort to get to the videos of kittens playing keyboards¹¹⁶ can be assured that even the mindless clickers will be protected from the extremely one-sided terms that litter the current EULA landscape. By requiring users to separately assent to any further terms, including crook provisions, the user retains a degree of power that he or she does not currently have. While some, if not most, users will simply click through mindlessly, there will be at least a portion of the users that will take the time to review the terms, or at least some of them, before assenting to them. This would give prudent consumers similar authority as courts that employ the doctrine of reasonable expectations in considering the unconscionability of specific contracts—one-sided terms or crook provisions would be culled.

There is also the possibility that the act of shining a spotlight on the drafters will do the trick. If the unconscionable terms and crook provisions that drafters of EULAs have regularly embedded or hidden in contracts are now brought to the forefront, perhaps it will now give the drafters pause prior to continuing this practice any further. Companies wishing to avoid persecution in the court of public opinion and liability in the courts of the several states would be wise not to include extremely one-sided terms in their agreements. Once companies are aware that an increasing number of contracting users and countless consumer advocacy groups will be on the lookout for such unconscionable contracting terms, the threat of discovery alone may be enough to police these terms out of the EULAs altogether, or at least minimize them. The theory behind

¹¹⁴ At least on the surface, this appears to be a perfect task for the ALI. The American Law Institute (ALI) was founded in the first quarter of the 20th century. According to their website: “The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education.” *About ALI*, The American Law Institute.com, <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited November 9, 2013).

¹¹⁵ The author being among the skeptics.

¹¹⁶ Charlie Schmidt’s Keyboard Cat! – THE ORIGINAL!, <http://www.youtube.com/watch?v=J---aiyznGQ> (last visited November 9, 2013).

this is the same one behind why people slow down on the highways that feature the “Speed Monitored By Aircraft” sign even though it is essentially an empty threat,¹¹⁷ or how the “warning” from a pool owner that a chemical in the pool will form a purple circle around the guilty party if it detects urine in the water will keep patrons from relieving themselves in the pool:¹¹⁸ the threat of discovery trumps the reward.

After all, the Internet is abundant with online communities banding together on the grass roots level for the purposes of political activism¹¹⁹—the threat of negative publicity could be all of the police power required to force service providers to change. For example, from 2008 to 2012, the number of social networking site users has grown from 33% of the online population to 69% of the online population. In 2012, 39% of all adults took part in some kind of political activity using social networking sites—meaning more Americans used social networking sites for political activist purposes in 2012 than *used them at all* in 2008.¹²⁰ Further, discussions on social networking sites can lead to further engagement with political issues.¹²¹ Once online communities become aware of continued unconscionable tactics by service providers, it is becoming increasingly likely in this climate of increased online activism, that there will be increased online mobilization for change. How ironic would it be if the social networking services provided by the guilty parties were used to mobilize against them?

In order to not risk “losing the forest for the trees,” EULAs should be limited to a certain number of pages or words, and should also be limited to specific fonts and colors. Hypothetically speaking, a shrewd company may strategically choose to increase the lengths of its agreement in 8-point, **red**, **Comic Sans MS**, banking on the premise that

¹¹⁷ Jason Bittel, *Do Police Really Use Aircraft to Enforce Speed Limits?*, Slate.com, http://www.slate.com/blogs/future_tense/2013/05/30/speed_limit_enforced_by_aircraft_do_police_really_do_that.html (last visited November 9, 2013).

¹¹⁸ *Id.*

¹¹⁹ See Lauren Barack, *Study: Young People of All Races Are Politically Active Online*, THE DIGITAL SHIFT, <http://www.thedigitalshift.com/2012/07/digital-divide/study-young-people-of-all-races-are-politically-active-online/> (July 10, 2012); cf. Henrik Serup Christensen, *Political activities on the Internet: Slacktivism or political participation by other means?*, FIRST MONDAY, <http://firstmonday.org/ojs/index.php/fm/article/view/3336/2767>, (February 7, 2011).

¹²⁰ Aaron Smith, *Civic Engagement in the Digital Age*, PEW RESEARCH CENTER, <http://pewinternet.org/Reports/2013/Civic-Engagement/Main-Report/Part-1.aspx>, (April 25, 2013).

¹²¹ *Id.*

of the small portion that even read the contract, *only a few will hang around by word 10,000 of contracts written like this.*¹²² Both the length of the contract and that of the clickable section should be limited to a reasonable word count, in the same way that the agreement should be limited to reasonable fonts and colors. In addition, placing all material terms or sections at the top of the contract in conspicuous locations, perhaps in italics or bold-faced type, or underlining the important sections, and a requirement to a reasonable extent that the terms are written in plain language (not the Klingon language¹²³ that is legalese) will also ensure that the user can manifest a legally-binding assent. This would be more effective if the standard portions of the EULAs were written by third parties, such as the ALI, discussed previously. Even though lawyers are notorious for taking a simple concept and burying it in legalese, the process at least will focus on tidying up the language of the agreements, while striving to make them more understandable to the common person, which is, at best, not the current objective, and, at worst, the *opposite* objective of what is occurring now.

B. Consideration for Crook Provisions

Recall that the holy trinity of classical contracts is offer, acceptance and consideration. Although money is the most popular form of consideration, anything of value which is bargained for, whether it is a performance of an action, or forbearance from an action, can serve as valid, legally-binding consideration in the eyes of the courts. If asked—instead of being unconscionably railroaded or swindled—users may actually agree to one-sided crook provisions in Terms of Service agreements in return for consideration. Even though most social media sites are free, or at least the bare nuts-and-bolts memberships are free, consideration can take many forms. For instance, service providers can offer to increase the email or cloud storage capacity for users that agree to let them sublicense material to third parties. Service providers like

¹²² See *Pollstar v. Gigmania, Ltd.*, 170 F.Supp.2d 974, 981-82 (E.D.Cal.2000). The court in this case expressed concern that the browsewrap in question, which was linked to from the homepage, was written in small, gray text on a gray background, making it difficult to read. The court further noted that the link itself on the homepage was not underlined, which is common practice on the Internet.

¹²³ Klingon language, http://en.wikipedia.org/wiki/Klingon_language (last visited December 2, 2013).

LinkedIn that offer a base-level, free service but also include a paid-for, upgraded service, like LinkedIn Premium, can offer a discount or free service for a period of time.¹²⁴ Perhaps service providers can even offer perks like rewards points, gift cards and other discount plans—the main objective is affording the user the opportunity to opt in of his or her own volition and maintain an element of power on his or her side of the bargaining table. The offer of increased consideration for the user will draw attention to the provisions. Thus, the consideration serves to legitimize the substance of the additional or modified terms of the contract by ensuring that the user was aware of the agreed upon terms.

Turning the table somewhat, perhaps users could negotiate their own one-sided provisions in return for consideration from the service provider, such as authorizing the service provider to sublicense their content. For example, users may want the forum selection clause to be their own home state or a neighboring state with more favorable consumer protection laws, and may be willing to make a concession on a crook provision or may be willing to pay a nominal sum to the service provider for it.¹²⁵ By definition, this process would turn the formerly one-sided contract “negotiations,” using the term loosely, into more of a two-sided bargain deserving of being called a negotiation.

A more forward thinking idea is to have users enter separate license agreements, or other types of contracts that authorize service providers to access their user data, supported by separate consideration with the service providers.¹²⁶ Perhaps before or simultaneous to the

¹²⁴ <http://www.linkedin.com>.

¹²⁵ Although one possible concern is the disproportionate effect this may have on users who could not afford to pay the sum required to receive these favorable terms, raising equal protection and due process concerns. But as previously noted, there is other consideration outside of money.

¹²⁶ An interesting parallel to the rights of end-users of social media sites can be made with the rights of collegiate football and basketball players whose personally-identifiable information (other than their names) was being commandeered for profiteering purposes by the National Collegiate Athletic Association (the NCAA) in their license agreement with E.A. Sports for usage of certain player likenesses in video games, such as the annual *NCAA College Football* series. These likenesses included skin tones, hometowns, height, weight, jersey numbers and position played—essentially all identifiable information outside of player names—and were being exploited by the NCAA without any consideration given to the collegiate players because of the NCAA’s tone-deaf clinging to the antiquated concept of sport amateurism. Former players filed a class action suit against E.A. Sports, the Collegiate Licensing Company (the CLC, which handles licensing rights for many universities) and the NCAA for their share of the annual billion-dollar profits of the video game. Group licensing agreements are commonplace in professional sports as each sport has its own players’ association; however, players’ associations are currently forbidden by the NCAA. As of the date of this writing, the class, made up current collegiate football and basketball players (surprisingly, former athletes were left

users' review of the service provider's Terms of Service, the users can submit their personal license agreement to the service provider for review. While most users would not be able to, or even want to, draft their own license agreements, perhaps consumer advocacy groups, ALI, or legislatures could draft a standard form license agreement for every user to use. Service providers could even be compelled to provide the standardized license agreement to users who require them. Consider it a cost of doing business.

C. Increased Federal Oversight and Penalties

Increased federal oversight may also assist to level the unequal playing field. Perhaps new legislation primarily concerning the promulgation of uniform online contracting, and the creation of a concordant federal administrative agency to oversee its faithful enforcement is the proper response.¹²⁷ The legislation could police and punish service providers who insist on incorporating unconscionable tactics and terms in their Terms of Service agreements, with the possibility of seeking sanctions, attorney's fees, punitive damages, statutory damages, and the creation of citizen-suit provisions, with increased penalties for repeat offenders. Unique penalties included in the legislation such as the threat of public disclosure to consumer

out) has received partial certification by the Ninth Circuit. E.A. Sports and the CLC have settled out of court with the plaintiffs to an undisclosed amount, leaving the NCAA the only remaining defendant in the case which is scheduled for trial in June. While a separate paper could be written on the syllogism between the end-users and collegiate student-athletes, suffice it to say that the crook-esque provision, or rather crook-esque tactics employed by the NCAA, namely the profiting at the expense of its student-athletes without notification or compensation to the student-athletes themselves, represents an important turning point in the fairness of license agreements that intend to feast off of the party with little or no power at the contracting table, and with no reasonable alternatives but to acquiesce—the very definition of what it means to be unconscionable. Legal scholars predict that the outcome one way or the other may lead to the unionization of collegiate athletes, certainly with respect to former athletes who were left out of the certified class. While unionization of end-users of social media sites may not be reasonable or even feasible, certainly some sort of group action is not altogether unforeseeable. A preliminary step in the right direction would be to have consumer advocacy groups or third party groups such as the ALI draft standardized forms of EULAs as mentioned above.

¹²⁷ The legislation should “primarily” be concerned with online contracting because, as over 200 years of American democracy has demonstrated, there will most assuredly be plenty of government pork hidden in the fine print of the proposed bill. It is a good thing that the unconscionability doctrine does not apply to legislative actions—under-handed and strong-armed tactics, which are condemned by courts in contract law, are regularly employed by politicians. If the doctrine were applicable in this area, it is questionable whether any legislation would be enforceable.

advocacy groups, major news outlets, or correspondences to the offending service provider's entire user list of the specific unconscionable tactic and/or provision (at the expense of the offending service provider) could be included as a further deterrent for repeat offenders.¹²⁸

If after new legislation is passed, if there was a challenge to its authority because of a conflict between the legislation and with the offending terms in a EULA, the courts will probably find that the federal legislation preempts the contract. It is true that courts will generally respect the freedom of contract and do not lightly set aside freely-entered agreements.¹²⁹ The principle rests on the premise that it is in the best interest of the public to give broad contracting powers through legally enforceable agreements.¹³⁰ However, because of the overwhelming amount of procedural and substantive unconscionability encompassed in EULAs, they could never be called "freely-entered into agreements" with a straight face. Jurisprudence in this area has shown that federal regulation usually trumps private contract,¹³¹ even though some courts have held that claims arising under the Copyright Act¹³² do not preempt contractual agreements regarding copyrighted works.¹³³ In general, courts will strike down contracts as a matter of public policy if they are preempted by federal legislation.¹³⁴ As Justice Roberts of the Supreme Court of the United States put it: "[t]he general rule is that [contracts] shall be free of governmental interference. But...contract rights are [not] absolute; for government cannot exist if the citizen may at will...exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."¹³⁵ All that needs to happen now is for Congress to act.

¹²⁸ Section VI(A), *supra*.

¹²⁹ Beacon Hill Civic Ass'n v. Ristorante Toscano, 662 N.E.2d 1015 (Mass. 1996).

¹³⁰ *Id.* at 1017, quoting E.Allan Farnsworth, Contracts § 5.1, at 345 (2d ed. 1990).

¹³¹ *Cf. Nebbia v. New York*, 291 U.S. 502, 523 (1934).

¹³² 17 U.S.C.A. § 101-810 (1976).

¹³³ While ProCD held that shrinkwraps were not preempted by federal copyright law, it was because the court found that the actions with respect to consideration and mutual assent were contract claims in nature and not under the purview of the federal rule. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996); see Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 456 (6th Cir. 2001); Acorn Structures, Inc. v. Swantz, 846 F.2d 923 (4th Cir. 1988).

¹³⁴ Restatement (Second) of Contracts § 179 (1981)("A public policy against the enforcement of promises or other terms may be derived by the court from legislation relevant to such a policy...")

¹³⁵ Nebbia at 510 (1934).

Concordantly, this leads to a more pessimistic (or realistic) view: even if laws are passed granting end-users the opportunity to negotiate, or sell to the service provider the ability to use the user's personal information for profiteering in return for separate consideration, it may not force service providers to change. This is what is called a "business decision." Some service providers may *choose* to continue to employ unconscionable tactics and seek to include unconscionable provisions—they may see it as a cost of doing business. "Should we pay all of this money upfront in modifying our agreements and separately negotiating with end-users, or should we take the risk based on the presumption that the end-users are too lazy to file a lawsuit and, even if they do, we will probably settle anyway?" It is kind of like the Ford Pinto recall in the 1970s.¹³⁶ "Should we recall thousands of cars now, which would be extremely expensive (even though we know there is a design flaw which causes an increased likelihood that the car will catch on fire if rear-ended), or should we 'let it ride' and risk the repercussions later, because paying out for damages to burn victims is cheaper than the recall?" While a strategy such as this in the modern era of predatory news reporting and overabundant litigation makes this much more of a foolhardy proposition now as compared to the climate of the 1970s, service providers could still be more likely to risk the possibility of a lawsuit rather than expending more initial capital to pay end-users for their crook provisions or pay to change their methodology and contracts. Startup costs for websites and service providers are very substantial and investors have no way of knowing whether or not their respective web services will succeed. There are only so many Mark Zuckerbergs in the world with the sure-thing, billion dollar ideas.¹³⁷ Wouldn't it be better to

¹³⁶ Mark Dowie, *Pinto Madness*, Mother Jones (September/October 1977), available at <http://www.motherjones.com/politics/1977/09/pinto-madness>.

¹³⁷ Winklevoss twins notwithstanding (whom the author likes to refer to as the "Winklevi"). See *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011). An entire paper could be written on the procedural as well as the substantive history of the Zuckerberg v. Winklevosses "sour grapes" saga. The court summarized it thusly: "[this] litigation involved several other parties and gave bread to many lawyers..." *Id.* at 1036. While the incredibly deep-pocketed Winklevi have no problem giving bread to their attorneys, it appears that after years of lawsuits and a Hollywood blockbuster which portrayed them rather unflatteringly (to put it mildly), their gripes (at least in the courts) have finally come to an end: "At some point, litigation must come to an end. [For the Winklevi] [t]hat point has now been reached." *Id.* at 1042. Now they have their "Winklevision" set on bitcoins, the controversial digital currency which affords retailers no transaction costs while maintaining absolute anonymity for consumers using it to purchase products. See Dylan Love, *Here's why the Winklevoss Twins LOVE Bitcoin*, BUSINESS INSIDER, <http://www.businessinsider.com/winklevoss-twins-on-bitcoin-2013-11> (November 13, 2013).

take get your product or service to market fast, earn your billions and the flee outside the reach of the American courts, say Hong Kong, before the lawsuits can even make it through the plodding American legal system? Ask Eduardo Saverin.¹³⁸

VII. CONCLUSION

It is the author's belief that end-user license agreements are intrinsically both procedurally and substantively unconscionable—they are textbook examples of take-it-or-leave-it situations where more powerful parties leverage their superior bargaining positions to force weaker parties to accept their terms, with no real alternatives. If, however, the reader is not persuaded by the author's arguments, either because of personal constitution or the subconscious desire to remain safely huddled inside Plato's cave,¹³⁹ the author hopes that the reader will at least concede that problems exist with current electronic contracting. Even outside of the unconscionability doctrine and the enforceability of unconscionable contracts, there are unanswered questions about electronic contracting in general, including the statute of frauds¹⁴⁰ and the applicability of and respect for American law in the international arena. In terms of contracting across national boundaries, whose law should apply? What if the company has locations or separate business entities in the same foreign nation as one of the contracting parties? Will this lead to international forum shopping?¹⁴¹ Numerous

¹³⁸ Eduardo Saverin, http://en.wikipedia.org/wiki/Eduardo_Saverin, (last visited December 2, 2013).

¹³⁹ PLATO, *THE REPUBLIC* (G.M.A. Grube trans., C.D.C. Reeve, rev., Hackett Publishing Co. 2d ed. 1992).

¹⁴⁰ The statute of frauds refers to the requirement that certain contracts be memorialized in writing and signed by both parties. All electronic contracts occur in a virtual world, with virtual signatures. In the case of browserwraps, there is not even a virtual signature. The UCC has its own statute of frauds provision. See U.C.C. § 2-201. The UCC requires that contracts for the sale of goods moveable at the time of service and with a price tag of more than \$500 be memorialized in a contract. The \$500 threshold was increased as per the most recent amendments to \$5,000 under the UCC but, as of 2013, the new threshold has not been adopted by any state legislatures. In addition, states generally have their own statute of frauds requirements in addition to those covered by the UCC, such as the sale or transfer of land, and contracts that cannot be completed within one year. See Statute of frauds, http://en.wikipedia.org/wiki/Statute_of_frauds, (last visited December 2, 2013).

¹⁴¹ Organizations such as the International Institute for the Unification of Private Law (UNIDROIT), the United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law have participated in the emerging global debate regarding

steps could be made to remediate the unconscionability of EULAs domestically but, such steps would be effectively moot if they would not be enforced in a foreign jurisdiction. Further discussion of these points is beyond the scope of this paper—what is important is to note is that the future of electronic contracting requires resolution of these matters, and others. After all, the predominant point is to preserve the enforceability of contracts and that they remain fair for both parties—a premise currently lacking from EULAs.¹⁴²

these sorts of global contract law concerns. See Jane K. Winn, Network Contracts: Managing the Interface between Commercial Law and Technical Norms in Networked Markets, 73 Col. L. Rev. 3 (2003).

¹⁴² Now back to more important things to do on the computer, like watching a middle-aged man serenade a litter of puppies to sleep. See The Puppy Whisperer, <http://www.break.com/video/the-puppy-whisperer-1468752> (last visited December 2, 2013).