

Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts

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INTRODUCTION

In its purest form, the law of contracts is premised on the ideal of a transaction between parties of equal bargaining strength, who enter a mutually binding and beneficial agreement through the give and take of an open and fair negotiation. But the realities of a modern market economy have required adjustments to that ideal. The law pertaining to adhesion contracts provides an apt example of one such adjustment. In those agreements, the negotiated contract gives way to the form contract in order to promote efficiencies of scale that will benefit both businesses and consumers (and the economy in general) by permitting the parties to forego the formalities of negotiation and mutual assent. This alteration to contract law was justified to allow businesses to reduce their transaction costs,¹ which translates as a benefit to consumers in the form of lower prices for goods and services.² Any such adjustment, however, should not undermine the basic idea of a mutually beneficial agreement between the parties. This is the role played by the doctrine of unconscionability with respect to the enforceability of adhesion contracts. It provides the consumer an “out” from adhesion contracts that do not, at least indirectly, reflect the value of a mutually beneficial agreement.

The era of the Internet has spawned a new species of adhesion contracts, accompanied by a new series of challenges to contract law. We are in the throes of a conflict between online businesses and consumers, in which Internet businesses use aggressive online adhesion contracts to create vast economic empires,³ and in which

¹ See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 438–39 (2002).

² See *id.* at 437–38.

³ See Leon E. Trakman, *Adhesion Contracts and the Twenty First Century Consumer* 6 (Univ. New S. Wales Faculty of Law, Working Paper No. 2007-67) [hereinafter *Adhesion Contracts*] (the “tension is between a code that facilitates merchant practice in a free market and a code that protects consumer interests from the predatory practices of large

consumers have few resources to resist this virtual onslaught on their privacy and property rights. The unconscionability doctrine, formed in a different era, is not up to the task. As a consequence, consumers are losing the battle. As numerous scholars have pointed out, new rules of engagement are needed to restore the balance of interests between contracting parties in the online market.⁴

Scholars and courts have suggested a variety of ways to resolve this conflict, but the proposed solutions offered thus far have yet to achieve a sensible balance between the interests of relevant parties. These solutions tend to err on one side or the other. For example, some of the solutions limit their applicability to unconscionable terms while ignoring other subtler terms that are even more invasive on consumers' privacy and property rights. Other solutions rely on a spontaneous adoption by the actors in the market that, so far, has not happened. This Article, borrowing from recent directives on consumer protection adopted in the European Union (EU), suggests the adoption of a measured, relatively precise standard against which to check the validity of online contracts. This standard strikes a balance between the conflicting interests at stake and is designed to reflect and address actual practices and challenges in the online market.

Part I provides a historical and critical overview of adhesion contracts, from their earliest forms in the late nineteenth century, up through their most recent manifestations in the online market. Next, Part II discusses the problems that consumers now face as a result of the broad adoption and enforcement of online contracts. Some of these problems derive from traditional adhesion contracts, and others

scale producers of goods and services"); see generally Leon E. Trakman, *The Boundaries of Contract Law in Cyberspace*, 38 PUB. CONT. L.J. 187 (2008) [hereinafter *Boundaries of Contract Law*].

⁴ See generally Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227 (2007); Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995) [hereinafter *Intellectual Property and Shrinkwrap Licenses*]; Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006) [hereinafter *Terms of Use*]; Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1 (2011); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984) [hereinafter *New Meaning of Contract*]; *Adhesion Contracts*, *supra* note 3; Hillman & Rachlinski, *supra* note 1.

are unique to online contracts. Part III assesses a variety of proposals designed to address the challenges to contract law in the context of online contracts. Part IV then analyzes the approach adopted in Europe to protect consumers' rights and the way countries in the EU have adapted this approach to their own system. Finally, Part V develops and recommends the adoption of a standard that will restore balance to the contractual relationships between online businesses and consumers of online products.

I

THE ORIGIN OF THE CONFLICT

Many words have been spent on adhesion contracts and online contracts.⁵ While this Article intends to briefly provide a description of the debate amongst scholars on these topics, it is important to present these contracts as an evolution of adhesion contracts. This will be helpful through the analysis of the conflict between consumers and businesses, and it will help draft rules that may effectively solve this conflict.

A. Adhesion Contracts

As previously stated and as generally understood, the idea behind adhesion contracts is to offer an opportunity to businesses to save on transaction costs by presenting their customers with standard forms with boilerplate terms.⁶ Given that these standard forms are the same for every consumer of a specific business, businesses do not have to hire lawyers to customize every single contract.⁷ Also, the uniformity of transactions derived from the adoption of the same forms allows businesses to predict the risks of transacting.⁸

When courts acknowledged businesses' adoption of adhesion contracts, they did so with a specific goal: help businesses flourish in

⁵ In this Article, the term "online contracts" will be used to generally refer to different kinds of electronic contracts, such as click-wrap and browse-wrap contracts, with different names such as "Terms of Service," "End User License Agreement (EULA)," "Terms and Conditions," etc.

⁶ E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26 (1990); RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.").

⁷ *New Meaning of Contract*, *supra* note 4, at 24.

⁸ *Id.*

a delicate time. In fact, between the late nineteenth and early twentieth centuries, extreme individualism was declining, and larger businesses were replacing smaller ones.⁹ Interstate commerce was booming, and businesses were reaching out to a higher-than-usual number of consumers.¹⁰ Adhesion contracts were the best solution to allow businesses to draft and execute contracts fast and efficiently. These contracts were first introduced to help specific markets, such as the insurance market, but they soon spread over to other markets, becoming the standard contracts offered to consumers.¹¹

Adhesion contracts deeply changed the importance of full negotiation and mutual assent, which are the very essence of traditional contracts.¹² In fact, with adhesion contracts, consumers usually lack any opportunity to negotiate the one-sided terms offered by businesses, and they have to accept these terms under take-it-or-leave-it conditions.¹³ These contracts also create the false expectation that consumers will read several pages of terms,¹⁴ which is generally unlikely.¹⁵ The result is that these contracts allow businesses to bind consumers over terms that the consumers most likely never read and, therefore, ignore.

Scholars were the first to recognize this new type of contract and warned about the risks deriving from their use.¹⁶ Courts somehow ignored this warning and welcomed adhesion contracts, possibly because the benefits granted to businesses were expected to transfer

⁹ *Id.* at 28–29.

¹⁰ *See id.* at 25.

¹¹ *See Adhesion Contracts*, *supra* note 3, at 7 n.13; *see also New Meaning of Contract*, *supra* note 4, at 25.

¹² *Id.* at 23.

¹³ *Adhesion Contracts*, *supra* note 3, at 11.

¹⁴ The duty to read is usually connected to the objective theory in contract law. But as underlined, for example, by Professor Todd Rakoff, “[t]his ‘duty’ can just as well be viewed as a refusal to impose any duty on the drafting party to ascertain whether form terms are known and understood.” Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1187 (1983).

¹⁵ *See* Nancy S. Kim, *The Duty to Draft Reasonably and Online Contracts*, in *COMMERCIAL CONTRACT LAW: A TRANSATLANTIC PERSPECTIVE* 181, 187–88 (Larry A. DiMatteo et al. eds., 2013) (“The inability to negotiate terms is a primary reason that few consumers actually read the terms of standard contracts. Courts, however, impose a duty to read on non-drafting parties to a contract even, incongruously, consumers in the context of standard form contracts who are inclined *not* to read the terms because of the futility of doing so. Because of the objective theory of contracts, a party who manifests assent to a contract may not later escape it by claiming that he or she did not read the terms.”).

¹⁶ *See New Meaning of Contract*, *supra* note 4, at 31–46.

over to consumers in the form of reduced prices for goods and services. Unfortunately, as already briefly stated in the Introduction, this did not happen. Businesses took advantage of the lack of mutual assent typical of these contracts and started including unconscionable terms, imposing harsh conditions, and limiting consumers' rights.¹⁷ Consumers can still seek protection from these contracts under the unconscionability doctrine, but this defense has limits that make it an ineffective defense, as explained later in this Article.

B. The Introduction of Shrink-Wrap Contracts

Adhesion contracts were the first example of the mitigation of the traditional rules of contract formation. "Shrink-wrap" contracts expanded this mitigation of rules and lowered the importance of mutual assent even more. A shrink-wrap scenario usually includes a business as the seller of software and another business or consumer as the buyer.¹⁸ The software's package displays only some of the contractual terms, usually the most generic ones.¹⁹ After the sale has been finalized and the buyer opens the package, the buyer may find additional contractual terms, usually displayed on the screen when the software is run or in a booklet located inside the box.²⁰

A shrink-wrap contract is similar to an adhesion contract because it allows businesses to draft one-sided terms in advance as standard forms. At the same time, a shrink-wrap contract is different from an adhesion contract. An adhesion contract presents consumers with all the terms at the time of signature, while a shrink-wrap contract discloses only part of its terms at the time of purchase and only discloses the additional terms at a later time.²¹

Courts initially refused to enforce any additional terms²² disclosed after the sale had been finalized under the theory of lack of mutual

¹⁷ This is evidenced by the multitude of cases filed regarding unconscionable terms in adhesion contracts.

¹⁸ See *Intellectual Property and Shrinkwrap Licenses*, *supra* note 4, at 1241.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and consideration." RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981). In view of this and in light of UCC section 2-207 (2002), courts that were called to consider the enforceability of shrink-wrap agreements before *ProCD v. Zeidenberg* decided for the agreements' unenforceability. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105 (3d Cir. 1991); *Vault Corp. v. Quaid Software Ltd.*, 655 F.

assent and under UCC section 2-207 (2002) (Additional Terms in Acceptance or Confirmation). The much-debated case *ProCD v. Zeidenberg*²³ endorsed these contracts and drastically changed the approach to them.

In *ProCD*, Zeidenberg purchased a disk from ProCD that contained a database created by the seller.²⁴ The box containing the disk had only part of the contractual agreement printed on it.²⁵ After purchasing the disk, Zeidenberg tried to install the software and was presented with an on-screen window containing ProCD's terms.²⁶ Unbeknownst to Zeidenberg at the time of purchase, the terms of the contract included restrictions on the use of the data, including a prohibition against reselling the data contained on the disk.²⁷ ProCD filed a claim asserting that Zeidenberg had impliedly agreed to be bound by the terms presented in the on-screen window, and that he had violated these additional terms by using the data contained in the disk to develop and sell his own database.²⁸ Zeidenberg argued that those additional terms were not part of the agreement because he was presented with them only after the purchase.²⁹

Judge Easterbrook rejected Zeidenberg's defense and stated that the additional terms displayed to the buyer after the purchase of the software would still bind the defendant, even if he might have ignored their existence at the time of purchase.³⁰ Judge Easterbrook, evidently inspired by the "legal realism" doctrine,³¹ justified his decision and

Supp. 750, 761 (E.D. La. 1987), *aff'd*, 847 F.2d 255 (5th Cir. 1988); Foresight Res. Corp. v. Pfortmiller, 719 F. Supp. 1006, 1010 (D. Kan. 1989).

²³ 86 F.3d 1447 (7th Cir. 1996). Cheryl B. Preston and Eli W. McCann consider this case "a key that opened the gates to broader enforcement of adhesive form contracts generally and allowed the new ungated form contract to morph into the truly unruly TOS, a beast untied from the contexts in which form contracts gained (limited) legitimacy." Preston & McCann, *supra* note 4, at 2.

²⁴ *ProCD*, 86 F.3d at 1450.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.*

³⁰ *Id.* at 1451.

³¹ *See* Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV 175, 179 (2006) (explaining how "legal realism," or "the way that judges will manipulate the doctrine to achieve the outcomes they otherwise consider fair or practical," can be seen in "Judge Easterbrook's unwillingness to follow UCC formation rules in *ProCD v. Zeidenberg* and *Hill v. Gateway 2000, Inc.*"). "In these cases, it seems that the courts will try to find a way to enforce terms if they think that

tried to mitigate its consequences for consumers by explaining that according to the contract, the buyer could have rejected the additional terms and returned the software.

This case shares the same policy rationale as other cases related to adhesion contracts: the need to help businesses flourish in a challenging time. As said before,³² courts acknowledged the advent of adhesion contracts and struggled to find a way to protect the weaker contracting party without threatening the principle of freedom of contract.³³ In *ProCD*, Judge Easterbrook wanted to assist software manufacturing businesses by endorsing a pro-businesses approach to shrink-wrap contracts.³⁴ On one hand, the court observed that printing all the terms and conditions on the package of the software was not feasible and would have impeded businesses from using the surface of the package for information more useful to buyers (e.g., hardware requirements, software features, etc.).³⁵ On the other hand, the matter at stake in this case (the sale of software) presented, for the first time, the unique issue of ease of duplication of digital content and the need

non-enforcement would lead to unjust enrichment of a bad actor, or would cause significant inconvenience, with little purpose, to businesses.” *Id.* The same analysis of Judge Easterbrook’s decision as a clear example of “legal realism” can be found in Preston & McCann, *supra* note 4, at 10 (“Rather than resolve the case through the mechanism established in the Uniform Commercial Code (U.C.C.) for dealing with later additions of new and different terms, Judge Easterbrook first articulated the result he believed he had to obtain for purposes of supporting market economics, and then simply declared that the terms were enforceable without much effort to locate a rule somewhere in traditional contract law.” (citations omitted)). Without going into the debate concerning “legal realism,” I do not personally think that the origin of the current problem arises from Judge Easterbrook’s “legal realism”; rather I think it comes from the unnatural effect that the *ProCD* case had over other cases dealing with online contracts and the way this case influenced other doctrines, such as the browse-wrap doctrine.

³² See *supra* Part I.A.

³³ Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943).

³⁴ It is clear in this case that Judge Easterbrook adopted the same *ratio* already highlighted in reference to adhesion contracts, given that he specifically quoted both E. Allan Farnsworth and the Restatement (Second) of Contracts, previously cited in this Article. See sources cited *supra* note 6. In addition to this, commentators of this case have confirmed the same intuition related to the *ratio* adopted by Judge Easterbrook. See Robert J. Morrill, *Contract Formation and the Shrink Wrap License: A Case Comment on ProCD, Inc v. Zeidenberg*, 32 NEW ENG. L. REV. 513, 516 (1998) (“In the mass market/consumer context, the shrink-wrap license provides an efficient way for the software vendor to dictate the terms of each sale. . . . In the mass market setting, however, the negotiation of terms for each sale is clearly impractical.”); see also Preston & McCann, *supra* note 4, at 8 (“in *ProCD* [Judge Easterbrook] rushes to cut away the broader historical context and foundational principles to create a result he thinks is necessary to foster digital markets”).

³⁵ *ProCD*, 86 F.3d at 1451.

to shape sales contracts more like license agreements than traditional sales.³⁶ The license agreement required long and complex contractual terms, which limited the rights of consumers,³⁷ and which would have been complex to include on the package.

The ultimate effect of *ProCD* was to allow businesses to bind buyers to terms presented only after the time of purchase, with no consequences for the sellers and losses for the consumer.³⁸ Not surprisingly, most of the controversial terms are usually included by businesses in the terms presented to consumers only after the time of purchase.

Judge Easterbrook's decision sharpened the conflict between businesses and consumers. The introduction and broad adoption of the principles arising from *ProCD* further reduced the importance of mutual assent in two ways. First, *ProCD* endorsed the idea that acceptance by performance of unilateral contracts applies to cases in which consumers do not have notice of the entirety of the contractual terms at the time of purchase (no actual notice of the terms). Second, the case also endorsed the idea that implied assent may arise from performing an act, such as opening the software package, even when the actor is not aware that the same act would indicate assent (defective assent).³⁹ *ProCD* endorsed an approach to shrink-wrap contracts that authorizes businesses to take advantage of consumers. And this phenomenon got worse with the adoption of browse-wrap agreements.⁴⁰

³⁶ ANDRE R. JAGLOM, CORPORATE COUNSEL'S GUIDE TO DISTRIBUTION COUNSELING § 10:29 (2014) ("Traditionally, because of the ease of copying, software publishers have licensed, rather than sold their software, so as to avoid the freedom of purchasers under the 'first sale doctrine' of the Copyright Act, to sell and otherwise dispose of lawfully made copies.").

³⁷ For example, an End User License Agreement (EULA) usually prohibits the buyer from selling the digital product to third parties. This is against the first sale doctrine, which grants the buyer the right to sell a product to anyone else. In a traditional sales contract, the buyer acquires the property of the good purchased. In a sales contract regulated by a EULA, the buyer only acquires a license to use the good purchased according to the terms and conditions provided in the EULA itself. See generally Michael Terasaki, *Do End User License Agreements Bind Normal People?*, 41 W. ST. U. L. REV. 467 (2014).

³⁸ It is fair to observe that the defendant in *ProCD* could not be properly classified as a consumer, but the case did not distinguish between consumers and sophisticated purchasers; therefore, we should assume, as many other courts have done, that *ProCD* applies to each and every shrink-wrap agreement.

³⁹ See *Terms of Use*, *supra* note 4, at 467–70.

⁴⁰ Mark A. Lemley states that the third "nail in the online assent coffin is the overlap between contract claims and concepts of property." *Id.* at 470. While I agree that this

C. The Introduction of Browse-Wrap Agreements

ProCD influenced a majority of subsequent court decisions on shrink-wrap agreements.⁴¹ *ProCD* also indirectly contributed to the development of browse-wrap agreements, and ultimately, to the development of the current doctrine of online contracts.⁴² In a browse-wrap agreement, the user of a website is bound by contractual terms that are not presented to him upfront.⁴³ Upon visiting a website, the user is presented with a hyperlink usually displayed at the bottom of the webpage. This hyperlink generally refers to “Terms of Service” or “Terms of Use.” Only by clicking on this hyperlink is the user directed to the contractual terms that regulate use of the website.⁴⁴

overlap furthered the dying process of online assent, I believe that a stronger factor leading to the diminishing importance of online assent has been played by browse-wrap agreements. These agreements contributed in the shifting of contracts of assent, from adhesion contracts, through the shrink-wrap doctrine. As stated before, adhesion contracts were the first examples of contracts involving consumers in which the latter did not have to fully negotiate the terms, and their consent was somehow weaker and less defined than the consent that consumers would have given in a fully negotiated contract. From there, shrink-wrap agreements further weakened the idea of assent by stating that consumers’ assent was not even needed for part of the contract: the contract was included in the software’s box and presented to consumers for the first time after opening the box and installing the software on their computers. Finally, browse-wrap agreements continued this shift by stating that express assent is not needed for the totality of the contract—a contract that is not even displayed to the consumer and is briefly presented in the form of a link that directs consumers to the full text of the agreement.

⁴¹ See generally *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638–39 (8th Cir. 2005); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1324–25 (Fed. Cir. 2003); *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 426 F. Supp. 2d 1101, 1106–07 (E.D. Cal. 2006); *Info. Handling Servs., Inc. v. LRP Publ’ns, Inc.*, No. Civ.A. 00-1859, 2000 WL 1468535 (E.D. Pa. Sept. 20, 2000); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000); *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1090–91 (N.D. Cal. 2000); *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 998 P.2d 305, 311–13 (Wash. 2000).

⁴² Another wrap agreement, the click-wrap agreement, is not individually covered in this Article. For a definition of click-wrap agreements, see *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. 2002). Click-wrap agreements are not considered individually in this Article because they do not present the same troubling issues that browse-wrap agreements do. Contrary to browse-wrap agreements, click-wrap agreements present to consumers all the terms of service upfront, consumers can choose whether to accept them or reject them, and they cannot use the software or the web service without expressing a choice. *Specht*, 150 F. Supp. 2d at 594. At the same time, click-wrap agreements share with browse-wrap agreements other issues when used in the online environment: inclusion of invasive terms, social pressure, and a flawed concept of the duty to read still put consumers at a disadvantage. Thus, most of the arguments presented in this Article may also apply to click-wrap agreements.

⁴³ *Preston & McCann*, *supra* note 4, at 18.

⁴⁴ See *id.*

These terms usually state that continued use of the website will be interpreted as implied consent.⁴⁵ Unlike click-wrap agreements, clicking on the hyperlink and reading the terms is not required to continue using the website in browse-wrap agreements.⁴⁶

Browse-wrap agreements further reduce the already thin relevance of consumers' assent in contract formation and increase the lack of actual notice of contractual terms to consumers. Early cases stated that browse-wrap agreements were unenforceable. For example, in *Comb v. PayPal, Inc.*, the Northern District of California found that a contractual term in a browse-wrap agreement was procedurally unconscionable because the consumer did not have a chance to negotiate the term and had to accept the contract on a take-it-or-leave-it basis.⁴⁷

Unfortunately, the number of cases decided against the enforcement of browse-wrap agreements⁴⁸ is now outnumbered by cases supporting the enforcement of these contracts.⁴⁹ In any event, this split by courts does not promote predictability in online transactions⁵⁰ and does not facilitate the adoption of clear standards for online contracts.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 218 F. Supp. 2d 1165, 1172–73 (N.D. Cal. 2002).

⁴⁸ For a recent case, see, e.g., *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009) (finding that a link to the terms—which displayed at the bottom of a web page in small print between a link to the privacy policy and the website's trademark—does not provide sufficient notice to the consumer). It is relevant to note that *Hines* does not state that browse-wrap agreements are not enforceable per se, as it merely addresses the sufficiency of the notice given by the business to the consumer and provides indirect guidance on how to design a website so that a hyperlink to the website's terms is sufficiently visible to a consumer to be considered proper notice, and therefore, bind the consumer to the terms.

⁴⁹ For a recent case, see, e.g., *PDC Laboratories, Inc. v. Hach Co.*, No. 09-1110, 2009 WL 2605270 (C.D. Ill. Aug. 25, 2009) (terms of the website were hyperlinked on the pages of the order process, and the last page of the order process directed the consumer to review those terms).

⁵⁰ See *Boundaries of Contract Law*, *supra* note 3, at 198–99. Trakman stresses the difficulty of predicting claims related to 'wrap contracts by stating that the "further purpose is to demonstrate that, however materially similar or different wrap cases may appear to be, one may end up attempting to reconcile the irreconcilable." *Id.* at 218–19. This supports the need to reform online contracts, as suggested in this Article, that will bring certainty in this area and that will allow parties—both businesses and consumers—to better predict enforcement of terms in 'wrap contracts.

The most indicative case supporting browse-wrap agreements is *Specht v. Netscape*.⁵¹ There, the plaintiffs downloaded software from a website created and managed by the defendant Netscape.⁵² In order to download this software, the plaintiffs were not required to agree to any contractual term; they did not have to sign a contract, nor did they have to click on any button to express their agreement.⁵³ The only thing plaintiffs had to press was “Download.”⁵⁴ Defendant argued that plaintiffs were bound by its contractual terms because a hyperlink at the bottom of the webpage directed the plaintiffs to their full text, and because these terms provided that the continued use of the website implied their acceptance.⁵⁵

While the court rejected the defendant’s claim, it did so only because the hyperlink on the webpage was not immediately visible to plaintiffs, but required them to scroll down in order for it to become visible.⁵⁶ *Specht* has been interpreted as the seminal case on browse-wrap agreements,⁵⁷ and it has opened the gate to many other cases that confirmed the enforceability of browse-wrap agreements.⁵⁸ This gives businesses the opportunity to bind consumers to contractual terms by merely placing a hyperlink on a webpage that directs consumers to terms that provide for implied consent by performance.

⁵¹ While *Specht v. Netscape* is one of the most relevant cases related to browse-wrap agreements, an early use of this term appeared in an earlier case, *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000), in which a user entered into an agreement by visiting a website. For the purposes of this Article, the definition of “browse-wrap” agreement is: terms and conditions which are posted on a website or accessible on the screen that do not require the user to expressly manifest assent and in which the user manifests assent by taking a specified action, such as continuing to use the website. Kunz et al., *supra* note 4, at 280.

⁵² 306 F.3d 17, 21 (2d Cir. 2002). Netscape Communications, the developers of the software discussed in this case, had a fundamental role in the growth of the Internet. In the early years of the Internet, Netscape Communicator, developed by Netscape Communications, was the leading web browser adopted by users. For instance, Netscape’s user share at its highest in 1996 was an outstanding 82.77%, compared to Microsoft Internet Explorer’s relatively small 9.6%. See *Usage Share of Web Browsers*, WIKIPEDIA, http://en.wikipedia.org/wiki/Usage_share_of_web_browsers (last modified Dec. 21, 2014).

⁵³ See *Specht*, 306 F.3d at 22–23.

⁵⁴ *Id.* at 22.

⁵⁵ *Id.* at 27.

⁵⁶ *Id.* at 32.

⁵⁷ Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36 CAMPBELL L. REV. 31, 43 (2013).

⁵⁸ See cases cited *supra* note 41.

The browse-wrap doctrine is another application of the analysis endorsed by courts with reference to adhesion contracts⁵⁹ and shrink-wrap agreements.⁶⁰ Courts wanted to provide websites with an easy process for contract formation while avoiding placing a burden on consumers' online experience. Asking websites to display the full text of the contractual terms to consumers and obtain their specific approval would have badly affected the use of websites in general. Courts likely realized that incentivizing the growth of the online market was a priority, and that consumers had to pay the price by renouncing any residual significance of the importance of their assent.

Some scholars claim that the current browse-wrap doctrine should not concern consumer protection advocates because courts have refused to enforce this type of contract when consumers are involved.⁶¹ While this is true, it cannot be assumed that courts will not someday enforce browse-wrap agreements against consumers. On the contrary, the fact that no court has expressly stated that browse-wrap agreements are unenforceable against consumers creates uncertainty in the system.

The extremely mitigated rules on contract formation adopted by the browse-wrap agreements allow websites to include any kind of unfair, abusive, and invasive terms in their contracts. It is too easy for businesses to take advantage of consumers, given that online contracts are formed with no actual or constructive notice of the terms and with consumers' implied assent. This makes the online market a dangerous environment for consumers.

D. The Need for a Change

This Article posits that the current standard of online contract formation should be modified. The new standard should protect consumers by providing that they should be timely and properly informed about the existence and content of contractual terms. Additionally, the new standard should reinforce the concept of

⁵⁹ See *supra* Part I.A.

⁶⁰ See *supra* Part I.B.

⁶¹ See, e.g., *Terms of Use*, *supra* note 4, at 462 (citing the following cases to prove that courts have never enforced a browse-wrap agreement against consumers: *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 556–57 (1st Cir. 2005); *Waters v. Earthlink, Inc.*, 91 F. App'x 697, 698 (1st Cir. 2003); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35–38 (2d Cir. 2002)).

consumers' assent while, at the same time, consider the importance of a fluid user experience in the usage of today's websites.

The time is ripe to introduce such a change. Online businesses do not require particular protection or incentive by the legal system anymore. The needs and ideas behind the decisions that endorsed online contracts no longer exist. In the Internet's infancy, a formal contract information process would have arrested cyberspace's growth. Today, the Internet is part of our everyday life, and a more formal process of contract formation—aimed at protecting consumers—would most likely not scare users away and would not affect the continuing expansion of cyberspace.

One of the leading technology companies in the world, Apple, Inc., provides an interesting lesson on how technological innovation can challenge human behavior and requires a soft touch to allow users to adapt. Apple also shows us how, once users have finally adapted to the technological innovation, the soft touch is not needed anymore. This is when innovation is finally free to bloom.

Apple gently guided its users to learn how to operate a smartphone with touch screens by using skeuomorphic design.⁶² Where users were used to operating their devices with a mouse and keyboard, Apple had to train them to use a completely new touch interface. At first, the company adopted an interface that mirrored real-life elements.⁶³ For example, the calendar “app” (application) had the shape of the pages of a real calendar; the way users flipped pages of an iBook replicated the movement of real pages in a book, including sound and animation of those pages.⁶⁴ This allowed Apple's users to familiarize themselves with the new touch interface using familiar elements.⁶⁵

⁶² A skeuomorph is “[a]n object or feature that imitates the design of a similar artifact made from another material.” *Skeuomorph*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/skeuomorph (last visited Dec. 29, 2014). In computing, the same term refers to “an element of a graphical user interface that mimics a physical object.” *Id.*

⁶³ Austin Carr, *Will Apple's Tacky Software-Design Philosophy Cause a Revolt?*, FAST CO. (Sept. 11, 2012, 7:45 AM), <http://www.fastcodesign.com/1670760/will-apples-tacky-software-design-philosophy-cause-a-revolt>.

⁶⁴ *See id.*

⁶⁵ *Id.*

In 2013, several years after the introduction of its first operative system for the touch devices, Apple introduced its new iOS 7.⁶⁶ With this version of its OS (operating system), Apple abandoned most of the skeuomorphic design and real-life elements and adopted a new and innovative look.⁶⁷ Users were now familiar with the touch interface, and they no longer needed guidance. When the design was free from the constrictions of the skeuomorphic look, Apple was finally able to embrace the full potential of its innovation.

A similar idea applies to the rules of contract formation for online contracts. Here, the mitigation of contract formation rules was the necessary transition to reach a comfortable level of awareness—the growth of e-commerce and penetration of Internet use—and knowledge of the innovation presented by cyberspace. Now, a good level of awareness and knowledge has been reached, and adjustments and compromise to the detriment of consumers are no longer justified. Rules of contract formation can be finally returned to their essence, with the importance of mutual assent between parties and actual notice to consumers, with reference to the content of contractual terms. This will ultimately allow online contracts to evolve to their full potential.

II

THE NATURE OF THE PROBLEM

By adopting an approach that mitigated the traditional rules of contract formation, courts have granted businesses an unfair advantage over consumers. Online contracts do not provide consumers with sufficient notice of the existence and content of contractual terms.⁶⁸ This makes it easier for businesses to include unconscionable and invasive terms. But, lack of notice is not the only problem that consumers currently face. Indeed, online contracts

⁶⁶ Tim Worstall, *Apple's iOS7, Well, It Was Time for Skeuomorphism to Die*, FORBES (Sept. 19, 2013, 9:44 AM), <http://www.forbes.com/sites/timworstall/2013/09/19/apples-ios-7-well-it-was-time-for-skeuomorphism-to-die/>.

⁶⁷ *Id.*

⁶⁸ Some scholars support courts' interpretation of browse-wrap agreements—with specific regard to the adequacy of notice to consumers of the contractual terms—by way of a hyperlink presented on a webpage. *See, e.g.*, Kunz et al, *supra* note 4, at 305 (“Our conclusion, drawing from precedent addressing click-through and browse-wrap agreements and from analogous practice in the paper world, such as terms incorporated by reference, is that using a hyperlink to disclose electronic standard terms can satisfy the proposed requirement of ‘opportunity to review.’”).

introduce a new and subtler type of social pressure, which compulsively induces consumers to enter into these contracts. What follows is a presentation of the main problems that consumers currently face with reference to online contracts.

A. Lack of Sufficient Notice of the Existence and Content of Contractual Terms

The current legal doctrine of browse-wrap agreements focuses on a system of notice and implied consent that causes consumers to be bound to terms they most likely ignore. The current standard of contract formation for these agreements, derived from the leading cases decided on this matter,⁶⁹ has four different prongs that need to be met in order to consider a contract enforceable: (1) the consumer must receive “adequate notice of the existence of the proposed terms,”⁷⁰ (2) the consumer must have “a meaningful opportunity to review the terms,”⁷¹ (3) the consumer must receive “adequate notice that taking a specified action manifests assent to the terms,”⁷² and (4) the consumer must take “the action specified in the latter notice.”⁷³ This standard does not protect consumers under such agreements. Courts’ interpretation of the adequacy of notice requirement dilutes the legal fiction that usually stands behind the concept of constructive notice and is of dubious efficacy.⁷⁴

⁶⁹ See generally *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000); *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. 99CV7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000), *aff’d*, 2 F. App’x 741 (9th Cir. 2001); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003); *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff’d*, 306 F.3d 17 (2d Cir. 2002); see also *Am. Airlines, Inc. v. Farechase, Inc.*, No. 067-194022-02, 2009 WL 4048496 (Tex. Dist. Ct. Mar. 8, 2003) (order granting temporary injunction).

⁷⁰ Kunz et al., *supra* note 4, at 281.

⁷¹ *Id.* It is helpful to consider an interesting view on the interpretation of this specific prong of the test provided by the Uniform Computer Information Transactions Act (UCITA). Section 113(a) of the UCITA states that: “A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review.” U.C.I.T.A. § 113(a) (2002). As it has been said, the UCITA was—at its origin—a very promising act which then failed to gather consensus, and it ultimately was only adopted by two states in the union, Maryland and Virginia. See Hillman & Rachlinski, *supra* note 1, at 491 n.314. While UCITA is not binding over the interpretation of this test, it is instructive.

⁷² Kunz et al., *supra* note 4, at 281.

⁷³ *Id.*

⁷⁴ In *Pollstar v. Gigmania, Ltd.*, for example, the court described the way terms were presented to the consumer—by way of an abnormal, but not underlined, link on the home page which directed consumers to another page, where the terms were displayed in small,

With the first prong of the standard, for example, courts have held that the presence of a “Terms of Service” hyperlink at the bottom of a webpage is sufficient to provide adequate notice to consumers of the existence of contractual terms.⁷⁵ This approach is far too optimistic and it ignores an important fact related to consumers’ behavior online: most of the popular websites—such as Google, Twitter, and Facebook—offer their services for free or under a “freemium” model.⁷⁶ Thus, when consumers visit these websites, they assume that they are not entering into any formal contract. In real life, if a person is offered an ice cream cone on the street for free, he does not assume he is entering into a contract with the vendor. Consumers have the same assumption with reference to websites.

In view of this, if consumers do not expect to enter into any contract, it is absurd to assume that the presence of a hyperlink on a webpage that merely states “Terms of Service” or just “Terms,” usually in small font, should be considered adequate notice of the existence and content of these terms. If consumers assume that they are not entering into any contract, they will not be on the lookout for any kind of term or hyperlink. To assume otherwise means imposing a duty on consumers that is even stronger than the duty to read: a duty to search for terms.

The same reasoning can be applied with reference to the third prong of the standard. If the placement of a hyperlink should not be sufficient to give adequate notice to consumers of the existence of contractual terms, the wording of these terms should not be sufficient to put consumers on notice that any further action will be interpreted as implied assent. If a reasonable consumer will ignore the presence

gray print on a gray background—and it agreed with defendant that many users of the site might not have been aware of the license agreement. 170 F. Supp. 2d at 981. At the same time, however, the court rejected defendant’s position and denied the motion to dismiss the suit for lack of mutual consent, reasoning that consumers are bound to contracts by using services or products without first seeing the terms of the contract in many other situations—e.g., in insurance contracts, in which the buyer pays the premium before the written policy is issued. *Id.* In addition to *Pollstar*, in *Ticketmaster Corp.*, the court stated it would prefer a rule that required “unmistakable assent” to the contractual terms by requiring, for example, clicking on an icon that says “I agree.” 2003 WL 21406289, at *2. However, the same court, citing other cases, stated, “the law has not developed this way.” *Id.*

⁷⁵ See Kunz et al., *supra* note 4, at 293.

⁷⁶ “Freemium is a pricing strategy by which a product or service (typically a digital offering . . . such as software, media, games or web services) is provided free of charge, but money (premium) is charged for proprietary features, functionality, or virtual goods.” *Freemium*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Freemium> (last visited Jan. 21, 2015).

of the hyperlink, he will not click on it, and he will miss the wording of the contract.

It is time to replace this faulty concept of constructive notice, based on what is really inadequate notice, with a new concept that is more respectful of consumers and more consistent with their true online behavior. As described *infra*,⁷⁷ we need to adopt a standard that switches from passive and ineffective notice to active notice that requires consumers to express their assent to unconscionable and invasive terms.

B. Unconscionable Terms

The consequence of the current browse-wrap standard is that consumers may end up bound by terms they did not have an actual opportunity to read. This circumstance increases the risk that consumers may be bound to unconscionable terms included in online contracts by dishonest businesses.

Examples of unconscionable terms are highlighted in cases such as *Gatton v. T-Mobile*.⁷⁸ There, the telephone carrier required by contracts that purchasers submit to binding arbitration for any claim related to the carrier's practice.⁷⁹ The same arbitration clause also provided for a waiver of class action claims.⁸⁰ The court declined to enforce such terms as procedurally and substantively unconscionable, but it did so after an extensive analysis of facts and arguments by the parties that made the decision particularly complex⁸¹ and that explored the limits of the unconscionability doctrine.⁸²

Other examples of unconscionable terms can be found in cases such as *Comb v. PayPal, Inc.*,⁸³ with reference to forum selection clauses, or *Bragg v. Linden Research, Inc.*,⁸⁴ with reference to arbitration clauses contained in the "Terms of Service" of websites.

⁷⁷ See *infra* Parts IV.–V.

⁷⁸ 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007).

⁷⁹ *Id.* at 347–48.

⁸⁰ *Id.*

⁸¹ *Id.* at 353–54.

⁸² See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), for a recent analysis on the unconscionability of class action waivers in consumer contracts.

⁸³ 218 F. Supp. 2d 1165 (N.D. Cal. 2002). In *Comb*, the court stated that “[a]lthough it is true that forum selection clauses generally are presumed *prima facie* valid, a forum selection clause may be unconscionable if the ‘place or manner’ in which arbitration is to occur is unreasonable taking into account ‘the respective circumstances of the parties.’” *Id.* at 1177 (citing *Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888, 894 (2001)).

⁸⁴ 487 F. Supp. 2d 593 (E.D. Pa. 2007).

C. Invasive Terms Unrelated to the Cause of the Contract

Unconscionable terms present a threat to consumers, but there are other types of terms that are more dangerous and even subtler. A court might not consider these terms as unconscionable for lack of substantive unconscionability, but they are still invasive and create a burden on consumers' privacy and property rights.⁸⁵ These terms are also particularly disturbing because, due to the inadequacy of notice described above,⁸⁶ consumers are unaware of their existence and do not realize that their privacy and property rights are being constrained.

In addition to being invasive, these terms are also subtle because they are usually unrelated to the cause of the contract offered by the businesses providing services to consumers. Using the same real-life example as before, it is like getting an ice cream cone for free and finding out that you impliedly agreed to have the vendor as a guest in your house for the following month.

Examples of these invasive and unexpected terms can be found in most of the contracts offered by major websites that provide their services for free, like Google, Twitter, and Facebook. These websites have billions of active and passive users⁸⁷ all over the world. Indeed, this makes the problem one that calls for immediate attention. This is the first time in the history of contract law that businesses have such a large number of customers, and thus, their terms have such an enormous impact.

While the types of invasive and unexpected terms are extremely vast and diverse, two particular types of terms are good examples for our analysis: those limiting the privacy of consumers, and those limiting property rights of consumers over content they post online. With reference to the terms limiting privacy of consumers, it is worth examining the contractual terms offered by Google regarding

⁸⁵ These terms may affect other rights of consumers but, for the sake of clarity, I only consider two specific types of invasive terms in this Article: the ones intruding over the privacy of consumers, and the ones affecting consumers' property rights with reference to the content they post online.

⁸⁶ See *supra* Part II.A.

⁸⁷ Active users are those that actively use the website on a regular basis. Passive users are those that, after creating an account on the website or using the website one or a few times, stopped using the website on a regular basis. It is worth noting that passive users are bound to the terms of the contracts offered by the websites mentioned in this Article—even if they stopped using these websites—as long as they do not formally terminate (if possible) those contracts.

consumers performing a search on the company's website. It is important to note that these terms apply both to registered and unregistered users.⁸⁸ While analyzing these terms, consider that at the time this Article was written, users performed about 45,000 searches on Google's website every second.⁸⁹ This provides an idea of the effect that Google can have on the market and the number of consumers that are exposed to the company's terms daily.

According to the current legal doctrine of browse-wrap agreements, just by performing an Internet search on a website, the consumer impliedly, and most likely unknowingly,⁹⁰ agrees to be bound by the website's contractual terms.⁹¹ Google's terms provide that the company is entitled to collect a broad amount of information on consumers performing any search,⁹² such as location,⁹³ search

⁸⁸ For the purposes of this Article, "unregistered users" are those that have not previously created an account with any Google Service. "Registered users" are those that have already created accounts with Google Services (e.g., Gmail, YouTube, or Google Maps), and they access the search engine while still logged into their Services.

⁸⁹ INTERNET LIVE STATS, <http://www.internetlivestats.com/one-second/#google-band> (last visited Dec. 29, 2014).

⁹⁰ See Preston & McCann, *supra* note 4, at 30 (citing David A. Puckett, *Terms of Service and the Computer Fraud and Abuse Act: A Trap for the Unwary?*, 7 OKLA. J. L. & TECH. 53 (2011)) ("While the majority of courts continue to suspect that the reasonable consumer should know that terms exist, one commentator recently argued that there are circumstances in which consumers cannot rationally be expected to fathom that they have entered into an agreement by performing certain actions. A prime example of this is the Google TOS [terms of service] that purportedly binds all consumers who merely conduct a Google search.").

⁹¹ Google notifies consumers by the presence of a link at the bottom of the webpage ("Privacy and Terms"). After clicking that link, the user is directed to a new page containing a list of terms available on Google's website, not the actual text of these terms. The user has to then click another link ("Read our terms of service") to finally access the actual terms of the website, which state on the sixth line that, "By using our Services, you are agreeing to these terms. Please read them carefully." This information is current as of the drafting of this Article. For more on Google's Terms of Service, see *Google Terms of Service*, GOOGLE, <http://www.google.com/intl/en/policies/terms/> (last modified Apr. 14, 2014).

⁹² *Privacy Policy*, GOOGLE, <http://www.google.com/intl/en/policies/privacy/> (last modified Dec. 19, 2014) ("We collect information to provide better services to all of our users—from figuring out basic stuff like which language you speak, to more complex things like which ads you'll find most useful or the people who matter most to you online." (emphasis omitted)).

⁹³ *Id.* ("When you use a location-enabled Google service, we may collect and process information about your actual location, like GPS signals sent by a mobile device. We may also use various technologies to determine location, such as sensor data from your device that may, for example, provide information on nearby Wi-Fi access points and cell towers." (emphasis omitted)).

queries, and device details.⁹⁴ Furthermore, Google does not limit this tracking activity to when the consumer is visiting its website; it also sends and stores a small file (a “cookie”)⁹⁵ on consumers’ computers that will track them during their visits to every other website not owned or controlled by Google but that uses Google’s technology.⁹⁶

An example may help in understanding the reach of the tracking activity performed by Google and the limits imposed on consumers’ privacy. When I, for the purpose of research, visited a website that I had never visited before via a direct link,⁹⁷ and which was completely unrelated to my scholarly, professional, or personal interests, that website displayed advertisements unrelated to its content but impressively related to previous searches or online browsing activities that I performed days before this visit. This happened because the previously-visited website most likely uses Google AdSense⁹⁸ to display advertisements on its pages and to monetize its content. The cookie that had been stored on my computer by Google the first time I visited the search engine has been tracking and profiling me for a long time, allowing third-party websites to display advertisements perfectly tailored to my interests. This largely benefits the third-party websites, because by displaying these tailored advertisements, it is

⁹⁴ *Id.* (“When you use our services or view content provided by Google, we may automatically collect and store certain information in server logs. This may include: details of how you used our service, such as your search queries, . . . device event information such as crashes, system activity, hardware settings, browser type, browser language, the date and time of your request and referral URL.” (emphasis omitted)).

⁹⁵ *Id.* (“We and our partners use various technologies to collect and store information when you visit a Google service, and this may include sending one or more cookies or anonymous identifiers to your device. We also use cookies and anonymous identifiers when you interact with services we offer to our partners, such as advertising services or Google features that may appear on other sites.” (emphasis omitted)).

⁹⁶ Some of the Google technology that websites use include, for example, Google Analytics to keep track of users and get information such as user locations, their operative system, and their computer; Google Webmaster, which allows websites to be properly listed in Google; and YouTube, which allows websites to embed its videos on their pages.

⁹⁷ I visited the website without going through Google or any other referral website. This occurs when a user types in the exact address of the website she intends to visit, for example, www.apple.com.

⁹⁸ Google AdSense gives publishers in the Google Network the opportunity to monetize their websites by displaying automatic text, images, videos, or interactive media advertisements that are targeted to site content and audiences. Google AdSense is a big source of revenue for the company. In the first quarter of 2014, Google earned \$3.4 billion (\$13.6 billion annualized), or 22% of total revenue, through Google AdSense. *See* Press Release, Google, Google Inc. Announces First Quarter 2014 Results (Apr. 16, 2014), available at http://investor.google.com/earnings/2014/Q1_google_earnings.html.

more likely that I will click on them, and this will generate a profit for the website.⁹⁹ However, the profits represent an invasion of my privacy, allegedly authorized by me via Google's contractual terms.

In addition to being invasive, these terms are also unexpected because they are unrelated to the scope of the contract that consumers unknowingly enter into. Consumers use Google's services to perform Internet searches. There is no correlation between this use and scope and the need to continuously track consumers after the search has been performed. Profiling and tailored advertisements are not what a reasonable consumer would expect from a contract that regulates an Internet search.

The second type of invasive terms is one generally included in most contracts offered by popular social networks, such as Twitter, Facebook, or Instagram. By way of these contracts, consumers give the websites a broad license to use any content the user posts on that website, i.e., photos, text, or video. This license allows the websites to use, copy, reproduce, process, adapt, modify, publish, transmit, display, and distribute consumers' content in any and all media or distribution methods now known or later developed.¹⁰⁰ Some websites, such as Facebook, include terms that allow the site to use content posted by consumers on their platforms, including profile pictures and names, with paid commercials displayed on the same platform.¹⁰¹

⁹⁹ Websites receive a fee each time a visitor clicks the advertisement posted—this is usually referred to as CPC (“cost-per-click”). *Cost-per-Click (CPC)*, GOOGLE, <https://support.google.com/adwords/answer/116495?hl=en> (last visited Jan. 21, 2015).

¹⁰⁰ For example, Twitter's “Terms of Service” include the following statement:

You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).

Terms of Service, TWITTER, <https://twitter.com/tos> (effective Sept. 8, 2014).

¹⁰¹ *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last revised Nov. 15, 2013) (“Our goal is to deliver advertising and other commercial or sponsored content that is valuable to our users and advertisers. In order to help us do that, you agree to the following: [Y]ou give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.”).

Of course, these websites need to obtain some sort of copyright license from their customers to display users' content online. And a good faith interpretation of these terms would suggest that such a broad license is needed to display content in an ever changing tech environment. For example, in the future, Twitter may launch a new way to deliver users' messages, such as a new app or a new website. A broad license allows this company to continue delivering its services with no need to return to the consumers to obtain an additional license for the new product.

However, a more skeptical interpreter would argue that these terms are too broad, and that these websites should draft them narrowly, limiting the use of content to that specific website and only within the context of the website's main features at the time the content has been posted by its users. The final result is one in which any consumer posting content online on one of these platforms should assume that the platform might use that content in any way possible.

Additionally, these terms are unexpected. When a consumer posts content online, he or she wants to share it on that specific platform with its users. There is no correlation between this limited scope and the need to obtain a broad license to use the consumer's content in any way the company may deem feasible. When a user posts a picture of his family on Facebook, he wants Facebook to distribute it to his friends. The user does not expect Facebook to use the same picture for commercials or to profile the user for tailored advertisement.

Businesses such as Google, Facebook, and Twitter see profiling their customers as the main monetization solution for their platforms. Consumers assume that these services are free, but in reality, users are paying a price for the services received—their privacy and their property rights. This Article does not maintain that websites such as the ones mentioned should not properly monetize their services. The scope of this Article suggests reforming the regulation of contracts online such that consumers will be made aware of the terms of use of these websites. Consumers should be able to decide whether privacy and property rights are a price worth paying for the continued use of the websites.

D. Social Pressure

In addition to the above-mentioned problems, online contracts add a new layer of complexity to the traditional adhesion contracts that already create social pressure on consumers by inducing them to sign

contracts quickly.¹⁰² Online contracts provide a new type of social pressure that influences consumers before and after the contract has been formed.

The major social networks and search engines are extremely popular among consumers, and they become more appealing with a high number of users. This not only creates a traditional incentive to use these websites, but it transforms the incentive to psychological need. Somehow, these websites create new languages, uniquely spoken by their users. If consumers do not want to be socially marginalized, they need to learn this language, and the only way to do so is to start using these websites. This surely happens to more vulnerable and susceptible consumers such as teens and young adults. However, the broad-scale adoption of these websites renders this scenario dangerous even to less vulnerable consumers such as adults. Social pressure lowers the attention span of consumers and, together with the inadequate notice required by the current doctrine of browse-wrap agreements,¹⁰³ makes it even more unlikely that consumers will be aware of the existence or content of any contractual term.

This social pressure does not only affect consumers merely before the formation of the contract, but it also affects them after the contract has been formed when they eventually want to terminate the contract and close their account on the website. This applies more to social networks than to websites such as Google; social networks facilitate networking, and terminating an account means losing all the contacts made on that network.

Reforming the rules of online contract formation and providing consumers with proper notice of contractual terms would help enhance the attention span of consumers affected by social pressure.

III

SOLUTIONS PROPOSED SO FAR

Scholars and courts have debated for years the fairness of the rules on contract formation in adhesion contracts and online contracts. Many solutions and approaches have been suggested, but none of them seem to be premised on a clear understanding of the complexity of the problem. Nor do these solutions strike the right balance

¹⁰² Social pressure usually happens because consumers are concerned that careful reading of the terms might be considered confrontational or simply rude. Barnes, *supra* note 4, at 260.

¹⁰³ See *supra* Part II.A.

between businesses' need for fluid contract formation and consumers' need for adequate notice. Before illustrating the standard that this Article suggests, it is important to analyze some of the most intriguing solutions that have been suggested so far by courts and scholars, as well as their limits.

A. The Unconscionability Doctrine

Terms in traditional adhesion and online contracts are usually scrutinized under section 2-302 of the UCC. While this provision should apply to sales contracts only, courts also broadly apply it to non-sales contracts. UCC section 2-302(1) provides that:

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.¹⁰⁴

This subsection does not provide a definition of “unconscionable” terms. Over the years, courts and scholars have filled this gap by creating the unconscionability doctrine. This doctrine has both a procedural and substantive component.

Courts consider a term procedurally unconscionable when, after analyzing a variety of factors, it finds that there was a lack of mutual assent and no meeting of the minds of the parties.¹⁰⁵ The factors that courts usually consider are age, literacy, sophistication of the parties, the manner and setting in which the contract was formed, and whether the weaker party had a reasonable opportunity to review and understand the terms, among others.¹⁰⁶

Substantive unconscionability is found when the contract contains unfair terms, such that “a contract term is one-sided and will have an overly harsh effect on the disadvantaged party.”¹⁰⁷ In deciding whether terms are substantively unconscionable, courts usually consider factors such as the commercial reasonableness of the

¹⁰⁴ U.C.C. § 2-302(1) (2012).

¹⁰⁵ *New v. GameStop, Inc.*, 753 S.E.2d 62, 66 (W. Va. 2013).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.¹⁰⁸

While the unconscionability doctrine has helped consumers defend their rights against harsh contract terms, the same doctrine has three limits with reference to online contracts. First, the current interpretation of substantive and procedural unconscionability suffers from a fragmentation of the doctrine as endorsed and applied by different courts.¹⁰⁹ This same problem is reflected in the interpretation of the relationship between substantive and procedural unconscionability.¹¹⁰

Second, only a court's intervention, usually initiated by consumers, can trigger the unconscionability doctrine, which will eventually produce its effects only after an analysis of the specific factual circumstances of the contract, on a case-by-case basis. Some scholars have considered this doctrine a shield more than a sword in the battle for the protection of consumers' interests.¹¹¹ This solution is not

¹⁰⁸ State *ex rel.* Ocwen Loan Servicing, LLC v. Webster, 752 S.E.2d 372, 377 (W. Va. 2013).

¹⁰⁹ See BRUNER & O'CONNOR ON CONSTRUCTION LAW § 21:142 (2014).

¹¹⁰ Unfortunately, unconscionability rules are applied differently from state to state. In California, for example, the party raising an unconscionability claim must prove both procedural and substantive unconscionability; the two prongs of the test operate on a sliding scale, in which the more the party proves one prong, the less significant the other prong becomes. Procedural unconscionability is shown under California law when the standard term is imposed and drafted by the strongest party, and it requires the subscribing party to take it or leave it. *See id.*; *see also* Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002); Ting v. AT&T, 319 F.3d 1126, 1148–49 (9th Cir. 2003).

A different approach is the one adopted by New York courts, in which a party need only prove substantive unconscionability in some cases. At the same time, this jurisdiction provides that courts should consider an ample spectrum of factors when deciding whether a term is procedurally unconscionable, such as whether one party lacked any meaningful choice in entering into the contract, whether the party claiming unconscionability is experienced and educated, whether the contract contained fine print, and whether the offeror used "high pressure tactics" when proposing the contract. *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 248–53 (N.Y. App. Div. 1998).

Finally, a different approach is the one adopted by courts in Washington and Illinois, in which substantive unconscionability and procedural unconscionability are considered two different defenses. *See* M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 314–16 (Wash. 2000); *see also* *In re* RealNetworks, Inc., No. 00 C 1366, 2000 WL 631341, at *5–7 (N.D. Ill. May 8, 2000).

¹¹¹ The analogy of the unconscionability doctrine as a shield is inspiring, and it highlights why this doctrine is not considered sufficiently aggressive to be considered a sword. *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 229 (2000) ("The unconscionability doctrine, famously, operates as a shield and not as a sword. One may protect oneself against enforcement of an unconscionable contract, but one may not obtain damages for having

efficient, and individual consumers cannot solve the problems of online contracts through individual cases.

Third, while the unconscionability doctrine may partially protect consumers' interests when timely triggered and properly interpreted by courts, this doctrine may not be able to protect consumers from invasive and unexpected terms.¹¹² It is doubtful whether a court would consider terms such as the ones included by Google and Twitter¹¹³ as overly harsh and substantively unconscionable. At the same time, the damages that these invasive terms may cause to consumers can be even worse than the ones that consumers may suffer from other traditionally unconscionable terms.

These three limits render the unconscionability doctrine an inefficient solution to the problems faced by consumers in online contracts. The proposal included in this Article aims to provide clarity to UCC section 2-302. The proposed rule is triggered at the time of contract formation and ensures adequate notice of the rights and obligations of consumers arising under the contract.¹¹⁴

B. Informed Consumers

Some scholars believe that the advent of the Internet has created a completely new category of consumers, the so-called "informed consumers" or "Twenty-First Century consumers."¹¹⁵ These scholars emphasize that the Internet is an information superhighway, and that each consumer can easily find online information regarding any product. These consumers should be more aware of contractual terms than pre-Internet consumers, and they should be able to access a higher amount of data before making their purchase decisions.

This idea portrays consumers in the digital age as aggressive actors having similar bargaining power to that of businesses. These consumers could use their knowledge and information to willingly accept the risk of boilerplate contracts as a way to obtain benefits

been subject to an unconscionable offer; nor may one seek restitution for compliance with an unconscionable contract.").

¹¹² See *supra* Part II.C.

¹¹³ See *supra* Part II.C.

¹¹⁴ See *infra* Part V.

¹¹⁵ Trakman provides an excellent excursus through some of the leading scholars' works on the idea of a new type of consumer, highly informed and able to bargain with businesses at almost the same level of power. *Adhesion Contracts*, *supra* note 3, at 16–19; see also *Boundaries of Contract Law*, *supra* note 3, at 194–96.

from businesses. And they would do so, for instance, by instigating other consumers to endorse a copycat behavior, or by bringing class action lawsuits against websites for imposing unconscionable or invasive terms on them.

This theory is not realistic. It is true that consumers nowadays are more informed than they were before, given that they have access to information sources before completing a purchase order (e.g., customers can read reviews posted by hundreds of users on Amazon or they can check reviews of businesses on Yelp). But while this information can help consumers choose products and services, it is very unlikely that it will also help them understand the terms of contracts offered by different websites. There are currently no comprehensive websites that offer reviews of contractual terms. Such a website would also probably be difficult to create, and it would not be able to cover many different possible scenarios. In addition, social pressure¹¹⁶ surely lowers the attention span and aggressiveness even of the most informed consumer. Therefore, we are far from all being informed consumers that do not need any protection from the abusive practices of online businesses.

C. Situational Duress Versus Aberrant Mass Consumer Electronic Contracts

Another scholar, Professor Nancy Kim, has strongly criticized every ‘wrap agreement, and she has described mass consumer electronic contracts as “aberrant.”¹¹⁷ This approach to online contracts has generated a theory of consumer defense against the abuse of businesses that finds inspiration in extreme contract defense theories, such as duress.

As generally known, duress is defined as any wrongful act or threat that overcomes the free will of a party.¹¹⁸ Kim’s idea is to transfer this concept to electronic contracts and to find a way to define the

¹¹⁶ See *supra* Part II.D.

¹¹⁷ See generally Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265 (2014). The main reasons why Kim considers electronic contracts as aberrant are the same as those highlighted in previous Sections of this Article. In particular, Kim underlines how “[c]ompanies intentionally minimize the disruptiveness of contract presentment in order to facilitate transactions and to create a smooth website experience for the consumer. All of this reduces the signaling effect of contracts and deters consumers from reading terms. . . . Companies take advantage of consumer failure to read and include ever more aggressive and oppressive terms.” *Id.* at 265–66.

¹¹⁸ See *id.*

wrongful act or threat in a digital form.¹¹⁹ The result of this approach is the creation of the doctrine of situational duress¹²⁰ as a defense to electronic contract formation. Under the doctrine, such a defense may be validly raised “if (1) a drafting company uses an electronic contract to block consumer access to a product or service; (2) the consumer has a ‘vested interest’ in that product or service; and (3) the consumer accepts the terms because she was blocked from the product or service after attempting to reject or decline them.”¹²¹ This approach has three main limits, two of which are related to the specific standard that it proposes, and the third is more generally related to the nature of the standard.

First, while the idea of transferring the doctrine of duress to the online scenario and transmuted into this new doctrine of situational duress is definitely interesting, the standard considerably limits its applicability.¹²² The first prong of the test refers to cases in which the drafting party—the business—uses an electronic contract to block consumers’ access to a product or service. This prong basically describes websites that require consumers to agree to a contract before using the website’s services. The standard would not apply to some of the examples of terms that have been presented in this Article (e.g., Twitter’s terms on content’s license),¹²³ given that these terms are usually included in web services accessible by users without the need to formally agree to any contract. More specifically, this standard would not apply to terms that limit privacy, like those offered by Google.

Second, the idea of “vested interest” as explained by the author of the doctrine¹²⁴ has a similarly limited applicability. Kim states that “vested interest” would occur with a consumer in a “rolling

¹¹⁹ *See id.* at 266.

¹²⁰ Traditional duress and situational duress would also have some differences when applying this doctrine. *Id.* (“Unlike traditional duress, a finding of situational duress would render a contract void and not merely voidable.”).

¹²¹ *Id.* at 279.

¹²² Kim recognizes it has limited applicability. *See id.* at 278 (“The recognition of a situational duress defense would be limited to situations where consumers are uniquely vulnerable because of the nature of their interest in the relevant product or service. In other words, situational duress does not encompass all electronic contracting scenarios.”).

¹²³ *See supra* Part II.C.

¹²⁴ *Id.* at 279–81.

contract,”¹²⁵ or “content hostage” scenario.¹²⁶ This basically limits the test to shrink-wrap agreements or agreements offered by other companies that invite consumers to store their documents on their services, such as Dropbox. This could theoretically keep these documents as hostages if the user does not agree to additional terms. Again, this would leave the terms used in our previous examples completely untouched.

Moreover, this test would face some of the limits already discussed in this Article with reference to the unconscionability doctrine,¹²⁷ given that situational duress would only be applied as a defense in court, and thus, would require consumers to trigger it by filing claims after the contract has already been formed. Finally, Kim’s approach seems to alienate online agreements, focusing too much on the consumers’ side of the transaction.

The biggest challenge here is to find a new balance between businesses and consumers without abandoning online contracts. The suggested solution takes into account the need for businesses to have a simple process to meet contract formation requirements without affecting usability of their websites and the need for consumers to be properly informed about the existence and nature of contractual terms.

D. American Law Institute Proposal

While the doctrine of unconscionability remains the main defense for consumers in online contracts, there has been a significant attempt to propose an alternative solution. In 1979, the American Law Institute (ALI) adopted a provision intended to regulate standard forms and limit the risks to consumers arising from these contracts.¹²⁸ While this proposal does not specifically address online contracts—having been drafted way before the advent of the Internet—its

¹²⁵ *Id.*; see also Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 744 (2002) (“In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods.”).

¹²⁶ See Kim, *supra* note 117, at 279–80 (“The second scenario involves ‘content hostage’ and occurs when the consumer uses a service that, either with or without a fee, permits consumers to store content on the company’s servers. . . . Email providers and social media or ‘sharing’ sites, such as Facebook, Twitter, and Instagram fall into this category A user typically registers and agrees to the terms of an electronic contract prior to being permitted to upload content. *After* registration and when the user has already stored content on the website, these companies may update their terms and require their users to accept before being allowed to continue using the service.”).

¹²⁷ See *supra* Part III.A.

¹²⁸ Barnes, *supra* note 4, at 231.

analysis is helpful to understand the effectiveness of similar proposals.

In particular, the ALI suggested adopting a new method to balance the interests of businesses and consumers. This attempt was codified in section 211(3) of the Restatement (Second) of Contracts, which states the following: “Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”¹²⁹ This proposal addresses the lack of mutual assent that is typical of traditional adhesion contracts and implicitly ignores the criticized duty to read doctrine.¹³⁰

Section 211(3) has been highly criticized.¹³¹ Professor James J. White, for example, expressed his concern that this rule might lead to testimonial abuse because section 211(3) adopts a subjective interpretation of the contract and its terms.¹³² On one hand, to successfully challenge the contract, the consumer would have to prove that he would not have manifested assent to the contract if he knew that a particular contract term was present.¹³³ On the other hand, the business would be able to defend its position by proving that it was not aware of the specific intent of the consumer.¹³⁴

Professor W. David Slawson offers another critique of this subsection, arguing that the attempt by the ALI does not provide any real solution to consumers because of the nature of adhesion contracts.¹³⁵ These contracts are adopted by businesses with reference to multitudes of consumers. Thus, it is extremely unlikely that these businesses will have information on the subjective status of each consumer. In addition, Slawson emphasizes that section 211(3) does not cover cases in which consumers do not appreciate the significance of the contractual term at the time of the contract’s execution.¹³⁶ Section 211(3) generated many other critiques amongst scholars.¹³⁷

¹²⁹ RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

¹³⁰ See cases cited *supra* note 22.

¹³¹ See generally Barnes, *supra* note 4 (providing an excellent analysis of the positive and negative aspects of the ALI proposal).

¹³² James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. UNIV. L.Q. 315, 323–24 (1997).

¹³³ *Id.* at 320.

¹³⁴ *Cf. id.* at 323–24.

¹³⁵ *New Meaning of Contract*, *supra* note 4, at 61–63.

¹³⁶ See *id.* at 62.

¹³⁷ See generally Barnes, *supra* note 4, for other arguments against section 211(3).

While ALI's proposal provides an interesting approach to the issues related to adhesion contracts, and while some scholars have attempted to defend the qualities of this subsection and argued for its adoption and use in current contract law,¹³⁸ this proposal has limits that make it incapable of solving the problems of formation of online contracts.

The limits are twofold. First, the proposal focuses too much on the subjective aspect of contractual intent and the awareness of businesses and consumers on a case-by-case basis. This focus would require the court to conduct a careful analysis of the circumstances surrounding the formation of the contract, and it would become very difficult to meet this burden of proof. Second, this theory shares the same limits of the unconscionability doctrine,¹³⁹ since only individual consumers challenging the enforceability of a contract in court would trigger its use.

E. Market Regulation

Several attempts have been made to solve the issues related to contract formation through market regulation. One of the most interesting proposals has been the "Do Not Track" project.¹⁴⁰ This project aimed to solve the issue of websites tracking users around the Internet, with the intent to profile them and display targeted advertisements.¹⁴¹

The initial idea was to create a Do Not Track list for online advertising that would be managed by the Federal Trade Commission.¹⁴² The Do Not Track movement captured the interest of web users. In July 2009, two researchers created a prototype add-on for one of the most popular Internet browsers at that time, Mozilla Firefox.¹⁴³ Users were able to use this add-on to communicate to the

¹³⁸ Barnes, *supra* note 4, at 262–63 (“The law should adopt a rule that more accurately addresses both consumers’ cognitive limitations and the tendency of business entities to exploit those limitations.”).

¹³⁹ See *supra* Part III.A.

¹⁴⁰ See generally Omer Tene & Jules Polonetsky, *To Track or “Do Not Track”*: *Advancing Transparency and Individual Control in Online Behavioral Advertising*, 13 MINN. J.L. SCI. & TECH. 281 (2012).

¹⁴¹ See *id.* at 284.

¹⁴² *Id.* at 322–23.

¹⁴³ See Christopher Soghoian, *The History of the Do Not Track Header*, SLIGHT PARANOIA (Jan. 21, 2011), <http://paranoia.dubfire.net/2011/01/history-of-do-not-track-header.html>.

world their intent to opt-out from any tracking activity by advertising companies.¹⁴⁴

The Do Not Track project faced a problem that was common of market regulation efforts. These efforts work only if the actors in a specific field join forces to adopt the solutions proposed. In particular, the Do Not Track add-on would have worked only if websites were coded to respect users' desires, expressed by turning the add-on on or off. Unfortunately, the project never received a broad adoption, and it never affected the market apart from the important role in sensitizing consumers and lawmakers on privacy issues online.¹⁴⁵ The business model most commonly used by online services is to profile users as much as possible and use this information to deliver ads. Business owners may not want to listen to consumers' desires to not be tracked, and they do not want to limit their profiling activities; this is like hoping that lions will not eat a gazelle if the latter wears a "do not eat me" t-shirt.

Another interesting market regulation proposal has been suggested by the Americans for Fair Electronic Commerce Transactions (AFFECT).¹⁴⁶ This group originally was created to seek changes in the Uniform Computer Information Transactions Act (UCITA).¹⁴⁷ After the debate on UCITA dried up, the group focused on drafting twelve contract principles that would help consumers regain their contractual power and determination.¹⁴⁸ The idea was to educate consumers on the effects of contractual terms and to incentivize businesses to adopt terms more respectful of consumers' rights and interests.¹⁴⁹ Unfortunately, this project had a similar fate of the Do Not Track proposal, and it never succeeded in effectively changing the way online contracts are formed.

The problem with market regulation efforts is the existence of vested interests and the difficulty in having the main players of this market comply with proposals that will limit their benefits and profits.

¹⁴⁴ *Id.*

¹⁴⁵ For an analysis of the future of the Do Not Track project, see Tene & Polonetsky, *supra* note 140, at 332–35.

¹⁴⁶ For a complete analysis of the principles introduced by AFFECT, see Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1071–1100 (2005).

¹⁴⁷ *Who We Are*, AFFECT, <http://www.ucita.com/who.html> (last visited Nov. 12, 2014).

¹⁴⁸ See generally Oakley, *supra* note 146, at 1072–73.

¹⁴⁹ *Id.*

As expressed in the following Sections¹⁵⁰ of this Article, the only hope for consumers is legislative intervention, reform to the current doctrine, and rules that take into account the need of consumers to be properly informed of contractual terms and their need to determine their rights and obligations.

IV

THE INSPIRATION FOR THE PROPOSED SOLUTION

As noted previously,¹⁵¹ the current doctrine of traditional adhesion contracts and online contracts¹⁵² has limits that create an imbalance between businesses and consumers in which businesses enjoy an enormous advantage over consumers. Further, claims and strategies available to consumers to protect their interests are limited, and the current legal doctrines do not offer proper tools to correct this imbalance.¹⁵³

The problems are caused by the following issues, which need to be properly addressed:

- (i) The uncertainty and fragmentation of the meaning of substantive unconscionability and, more specifically, the lack of a codified determination of unconscionable terms. This circumstance does not facilitate transactions and creates a grey area that can be leveraged by businesses;¹⁵⁴
- (ii) The uncertainty and narrow definition of procedural unconscionability and the fragmented interpretation of the relationship between this factor and substantive unconscionability;¹⁵⁵
- (iii) The inadequacy of the current notice standard endorsed by courts with respect to browse-wrap agreements;¹⁵⁶
- (iv) The lack of any provision that refers to invasive and unexpected terms;¹⁵⁷ and

¹⁵⁰ See *infra* Part V.

¹⁵¹ See *supra* Part III.

¹⁵² This term is used in this Article to consider each and every kind of online contract, including click-wrap and browse-wrap contracts. Given the fluidity of technology and the rapid evolution of the Internet, a paper that aims to provide a solution to the imbalance of interests between businesses and consumers should consider these contracts in general, focusing on their common grounds, and not on their minimal differences. Doing so would provide a solution that can fit any online contract, the ones currently adopted by the majority of businesses, and the ones that may be created in the future.

¹⁵³ See *supra* Part III.

¹⁵⁴ See *supra* Part III.A.

¹⁵⁵ See *supra* note 110.

¹⁵⁶ See *supra* Part II.A.

(v) The need for a solution that is going to be triggered before contract formation and that changes the current idea that a term is valid unless a court declares it unconscionable. A term, on the contrary, should be invalid, unless it is in compliance with new rules of contract formation for online contracts.¹⁵⁸

The goal of this Article is to provide a uniform solution to the issues outlined above. This solution would allow businesses to continue benefitting from the mitigated rules of contract formation under the doctrines of adhesion contracts and online contracts. At the same time, this solution would allow consumers proper and timely notification of contractual terms that may deeply affect their rights and contractual position.¹⁵⁹

Inspiration for the proposed solution comes from foreign legal systems and doctrines. The European system is especially considered for its ample regulation of consumers' rights. The purpose of this Article is not to suggest the adoption of such regulations, but to understand how these regulations and doctrines may help us craft rules of engagement regarding the conflict in online contracts between businesses and consumers.

A. The European Directive on Abusive Terms

The U.S. legal system has specific rules that deal with consumer protection.¹⁶⁰ But with reference to the construction and enforcement

¹⁵⁷ See *supra* Part II.C.

¹⁵⁸ See *supra* Part III.A.

¹⁵⁹ See Nancy S. Kim, 'Wrap Contracts and Privacy (Ass'n for the Advancement of Artificial Intelligence, No. Technical Report SS-10-05, 2010). Here, the author correctly underlines that "[b]ecause the user/licensor is the party granting the website a license to use its personal information, the online agreement should be structured to require the user to actively assent to indicate the nature and scope of that license." *Id.* at 3.

¹⁶⁰ See Winn & Bix, *supra* note 31, at 181–82, for a more extensive presentation of this issue. In particular, it is interesting to see how there is a difference on the role that, according to the U.S. and European system, government should have in regulating markets. *Id.* at 183–84. In the United States, the idea of market-driven regulation is stronger than government regulation, while in the EU this approach has not been broadly embraced, and the general consensus is that government should intervene in providing consumers' protection by enacting consumer-driven regulations. This may be the reason why current doctrines in the United States are not capable of finding the right balance between businesses and consumers. It is true that consumers may leverage the information readily available on the Internet to make informed choices about the contracts they enter into with businesses. But it is also true that—as previously stated in Part III of this Article—it is very likely that other factors, such as social pressure, strength of businesses online, etc., will play a fundamental role in deciding whether the current American approach of general deference to private initiative should be maintained or whether the

of contracts, the same rules that apply to transactions between businesses also apply to transactions between businesses and consumers.¹⁶¹

Europe takes a different approach to the construction and enforcement of contracts. In the past two decades, the European Union has been very active in the area of consumer protection and has enacted a series of directives aimed at regulating consumer contracts.¹⁶² This approach has been part of a harmonization process aimed at adopting uniform rules, ensuring a minimum level of consumer protection.¹⁶³ While these regulations do not specifically target adhesion contracts or online contracts, they apply to any contract involving consumers.¹⁶⁴ Therefore, the same rules apply to adhesion contracts and online contracts, as long as consumers are parties to these contracts.

Directive 93/13 on Unfair Terms in Consumer Contracts (the “Directive”) is the most interesting regulation for the purposes of our study.¹⁶⁵ The Council of the European Community adopted the

system should come closer to the EU approach, which is aimed to meet high levels of consumer protection through regulation and harmonization.

¹⁶¹ See *id.*

¹⁶² The most relevant ones are, together with the Directive on Unfair Terms in Consumer Contracts (broadly analyzed in the following pages of this Article): Council Directive 97/7 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 4, 6 (EC) (the Distance Selling Directive, which regulated transactions between remote merchants and consumers, when the contract is offered on television, through telemarketing, on the Internet, or through other electronic communication channels) and the EU Electronic Commerce Directive 2000/31, O.J. (L 178) 17, 7 (EC) (establishing harmonized rules on issues related to transparency and accountability in online commerce).

¹⁶³ See generally Aristides N. Hatzis, *An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts*, in *STANDARD CONTRACT TERMS IN EUROPE: A BASIS FOR AND A CHALLENGE TO EUROPEAN CONTRACT LAW* 43 (Hugh Collins, ed. 2008).

¹⁶⁴ See *id.* at 44.

¹⁶⁵ This is not the first time that the EU Directive on Unfair Terms in Consumer Contracts has been considered as an inspiration for reforming the rules of contract formation. See Oakley, *supra* note 146, at 1065–66. Professor Oakley’s article shares with this Article some of the concerns related to contract formation, but it mainly focuses on software licenses and the issues related to shrink-wrap and click-wrap contracts. The different focus of the analysis between Professor Oakley’s article and this Article is justified by a shift in the adoption of ‘wrap contracts online. While at the time of Professor Oakley’s article the main concern was End User License Agreements included in software contracts, today the main concern is browse-wrap contracts, due to their massive adoption and effects on consumers. When Professor Oakley wrote his article, some of the websites mentioned here (e.g., Facebook, Twitter, and Instagram) did not exist, or they were still at their early stages of development. For example, Facebook had only 6 million users in

Directive on April 5, 1993, and it was intended to address businesses ever growing use of unfair and abusive contractual terms that damage consumers.¹⁶⁶ Specifically, the Directive's goal is to protect consumers from abusive and unfair terms included in contracts without their consent, to provide a non-exhaustive list of abusive and unfair terms common in these types of contracts, and to disincentivize the adoption of oppressive terms in contracts with consumers.¹⁶⁷

While the Directive addresses "abusive and unfair" contractual terms, the definition of these terms, per the text of the Directive, is similar to the definition of unconscionable terms adopted by our system. This similarity suggests that the Directive, and the solutions there offered, might help us solve the issues arising from uncertainty in the scope of the substantive and procedural unconscionability doctrine.

The European legislature has adopted a clear definition of unfair and abusive terms. In contrast, UCC section 2-302 only states:

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

2005. Ami Sedghi, *Facebook: 10 Years of Social Networking, in Numbers*, GUARDIAN (Feb. 4, 2014, 9:38 EST), <http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics>. This number has significantly increased in the following years, and the popular social network reached 1.23 billion users at the end of 2013. *Id.* With reference, in particular, to the analysis of the impact that the European Directive on Unfair Terms may have on our system, Professor Oakley's article differs from this one. Professor Oakley covered some of the benefits offered by the Directive, but he believed that such an approach would have been difficult to adopt in our country because of vested interests that would resist. *See* Oakley, *supra* note 146, at 1070. Professor Oakley then considered the efforts of AFFECTS and its proposal of twelve principles that should have been adopted in electronic transactions to protect consumers' interests. While I share with Professor Oakley the concern about difficulties in the adoption in our system of some of the solutions introduced by the EU Directive, I believe that market regulation solutions, such as the one proposed by AFFECTS, will not likely succeed because of the vested interests cited by Professor Oakley. The broad adoption of browse-wrap agreements and the predatory practices by businesses require a stronger intervention, such that only the legislature can provide. As illustrated in Part VI, this Article suggests that only a reform of UCC section 2-302, or the enactment of new rules inspired by the principles described here, will have a chance to shift the current doctrine of online contract formation to an approach more favorable to consumers.

¹⁶⁶ Hatzis, *supra* note 163, at 44.

¹⁶⁷ *Id.*

may so limit the application of any unconscionable clause as to avoid any unconscionable result.¹⁶⁸

As indicated before,¹⁶⁹ this provision does not clarify the meaning of the term “unconscionable,” and courts have to fill in the gaps by providing a fragmented interpretation of this term. On the other hand, under Article 3.1, the Directive provides the general criteria to define unfair terms: “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”¹⁷⁰ Article 3.1 clarifies the meaning of unfair terms. If a term causes significant imbalance and the imbalance causes a detriment to consumers, then the term is “unfair.”

While Article 3.1 defines the meaning of unfair terms, the Directive also provides a list of terms that the European Council considers unfair.¹⁷¹ When a contractual term matches one of the types

¹⁶⁸ U.C.C. § 2-302(1) (2012).

¹⁶⁹ See *supra* Part II.B.

¹⁷⁰ Council Directive 93/13/EEC, on Unfair Terms in Consumer Contracts, art. 3.1, 1993 O.J. (L 95).

¹⁷¹ The Directive’s Annex includes “Terms Referred to in Article [3.2].” *Id.* These terms have the object or effect of:

(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

(e) requiring any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation;

(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

included in the list, it will be considered unfair with no need to prove the requirements of Article 3.1.

This list avoids the confusion that fragmented case law has generated in our system in interpreting the meaning of “unconscionable.” The difference is striking. While our system requires that courts assess contractual terms and their unconscionability on a case-by-case basis, the list and definitions provided by the Directive guarantee certainty and uniformity. Businesses are on notice that any term within the list is assumed to be unfair and, thus, invalid. It is also important to note that the

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller’s or supplier’s obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

(o) obliging the consumer to [fulfill] all his obligations where the seller or supplier does not perform his;

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter’s agreement;

(q) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

Id.

codification of the meaning of the term “unfair” does not limit its applicability in the future, given that the Directive’s list is not exhaustive, and courts in Europe are free to find additional unfair terms. Moreover, comparing the Directive to our doctrine may shed light on the doctrine of procedural unconscionability and its relationship to substantive unconscionability.¹⁷²

The UCC is silent on procedural unconscionability, a territory of case law. The current doctrine provides that to establish the procedural unconscionability of a term, a plaintiff must prove that there was no voluntary meeting of the minds of the parties.¹⁷³ This circumstance should be analyzed considering all the factors involved in the transaction, including the different bargaining powers of the parties; “hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed.”¹⁷⁴ The standard created by our courts includes too many factors and does not provide a clear definition of procedural unconscionability.

Conversely, the Directive provides a more straightforward solution which states that a term is procedurally unfair when it has not been negotiated in full. This concept is further expanded in Article 3.2 of the Directive, which states: “A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”¹⁷⁵

Unlike our doctrine, the Directive does not provide a multitude of factors to be considered in determining whether a term has been procedurally unconscionable. The Directive provides that full negotiation of a term may cure any procedurally unconscionable term.¹⁷⁶ In particular, and with reference to adhesion contracts, the Directive shifts the burden of proof onto the business, and it provides that full negotiation should be interpreted as giving the consumer an opportunity to influence the substance of the term.¹⁷⁷

¹⁷² See *supra* Part II.B.

¹⁷³ *New v. GameStop, Inc.*, 753 S.E.2d 62, 70 (W. Va. 2013).

¹⁷⁴ *Id.* at 75.

¹⁷⁵ Council Directive 93/13, on Unfair Terms in Consumer Contracts, art. 3.2, 1993 O.J. (L 95) (EEC).

¹⁷⁶ *Id.* at art. 3.1.

¹⁷⁷ *Id.* at art. 3.2.

This comparative analysis of the EU and U.S. systems seems to suggest that the problems related to substantive unconscionability might be solved by a regulation that provides a clear understanding of its meaning, defines unconscionable terms, and includes a list of terms that are assumed to be substantively unconscionable. Additionally, the problems related to procedural unconscionability might be solved through regulation that focuses on the importance of negotiation before contract formation and gives consumers a proper opportunity to influence the substance of the terms. While the substantive unconscionability solution in the Directive may be directly imported into our proposed regulation, the European solution related to procedural unconscionability needs some fine tuning that may help us solve the issue of inadequate notice of the existence and content of contractual terms to consumers.

The Directive considers full negotiation of terms as a sufficient cure to any unfairness and abusiveness.¹⁷⁸ By doing so, the Directive ignores that full negotiation is not the equivalent of voluntary negotiation. In fact, sometimes consumers do not have any choice but to contract with a business, maybe because the business is operating a monopoly, or because there are not valid or worthwhile alternatives to the businesses' market. In these cases, while the parties may have fully negotiated the terms of the contract, they may not have been in the same bargaining position.

European countries have implemented the list of unfair terms provided by the Directive differently.¹⁷⁹ Some countries have interpreted the list as a "black list," meaning that each and every term included in the list is always unfair and never curable by full negotiation.¹⁸⁰ Some other countries have considered the list as a

¹⁷⁸ See *id.* at art. 3.1.

¹⁷⁹ For readers not familiar with the EU legal system, while regulations issued by the EU Council are immediately enforceable in each and every country of the European Union, with no need of further adoption or ratification by these countries, the directives are rules that each country has to adopt and enact in their own territories. The EU Directive on Unfair Terms in Consumer Contracts provides that its provisions should be considered as the minimum required, and that each country is entitled to enact stronger rules for the protection of consumers. See, in particular, Article 8 of the EU Directive: "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer." *Id.* at art. 8.

¹⁸⁰ Martin Ebers, *La Revisione del Diritto Europeo del Consumatore: l'Attuazione Nei Paesi Membri della Direttiva Sulle Clausole Abusive (93/13/CEE) e le Prospettive d'Ulteriore Armonizzazione*, 2 *CONTRATTO E IMPRESA/EUROPA* 696, 712–14 (2007).

“grey list,” meaning that terms included in this list are considered unfair and abusive unless the defendant can prove that the terms have been fully negotiated.¹⁸¹ Finally, other countries have adopted a mixed solution, listing some of the terms of the Directive as absolutely unfair and abusive—and therefore not curable through full negotiation and other terms as being abusive and unfair unless fully negotiated.¹⁸²

The most balanced and interesting solution is the one adopted by countries that use the mixed approach. Having specific terms included in a “black list” means that these countries consider these terms so harmful to consumers that they cannot be cured by full negotiation. At the same time, having terms in a “grey list” allows flexibility in contracts, and businesses will not have to worry about unfair and abusive terms eventually included in a contract, as long as these terms were fully negotiated with consumers. If the consumer was pressured during the formation of the contract, but the term was fully negotiated and the same term is not in the “black list,” freedom of contract will take precedence; the term is not considered to create relevant concern for consumers’ protection, and under a big picture analysis, consumers will benefit from freedom of contract.

The second fine tuning that the Directive needs is related to the meaning of “full negotiation” under Article 3.1 and the requirement that consumers have an opportunity to influence the contractual terms under Article 3.2. Again, it is helpful to see how single countries in Europe have implemented the Directive differently. Here, the approach of the Italian legislature is of particular relevance.

The Directive has been implemented in Italy as part of the Consumer Code¹⁸³ and overlaps with provisions already included in the Italian Civil Code with reference to adhesion contracts.¹⁸⁴ In particular, Article 1341 of the Italian Civil Code provides that specific unfair and abusive contractual terms are not enforceable when included in adhesion contracts, unless the weaker party specifically

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Decreto Legislativo 6 settembre 2005, n. 206 (It.), available at <http://www.agcm.it/en/list-consumer-protection/1725-legislative-decree-no-206-of-6-september-2005-consumer-code.html> (English version).

¹⁸⁴ See Domenica Cuzzola, *La Tutela della Parte Contrattuale Debole*, CENTRO DI ORIENTAMENTO GIURIDICO DEL CONSUMATORE, http://www.giurisconsumatori.it/index.php?option=com_content&view=article&id=12%3Ala-tutela-della-parte-contrattuale-debole-avv-d-cuzzola&catid=3%3Anotizie&Itemid=4&showall=1 (last visited Nov. 13, 2014).

approves them in writing.¹⁸⁵ More specifically, Italian adhesion contracts require two signatures in order to be properly executed.¹⁸⁶ The first signature must be placed at the end of the contract.¹⁸⁷ The second signature must be placed right after an additional clause, specifically indicating the clauses of the contract that are considered unfair under the Consumer Code.¹⁸⁸ Through an additional signature, the legislature wants to ensure that the weaker party in the contract has actual notice of the existence and content of the potentially abusive and unfair terms.

The Consumer Code does not refer to Article 1341 of the Italian Civil Code, and it merely matches the text of the EU Directive. Italian courts have interpreted the “full negotiation” requirement of the Directive as having been implemented in the Consumer Code, and they have distinguished the requirement of full negotiation from the requirement of the double signature under Article 1341.¹⁸⁹ In other words, courts have interpreted the Consumer Code to include the “full negotiation” requirement, and it cannot be met by approving unfair and abusive terms in writing, pursuant to Article 1341.¹⁹⁰ The full requirement is met only when it is proved that the consumer actively participated in the contract formation since an early stage of the negotiation.¹⁹¹ This creates two different standards in the Italian system. On one hand, the standard from Article 1341 (the double signature requirement) applies to adhesion contracts in general. On the other hand, the “full negotiation and active participation” standard applies to adhesion contracts involving consumers.

Italy’s interpretation is not advisable because it places a heavy burden of proof on businesses, thus impairing online contracts.

¹⁸⁵ Gino Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 AM. J. COMP. L. 1, 2 (1962).

¹⁸⁶ *Id.* at 12–13; *see also* Cass. civ., sez. III., 17 marzo 1998, n. 2849, Giust. civ. 1998, 594 (It.); Cass. civ., sez. II., 5 novembre 1999, n. 12296, Dir. e prat. soc. 2000, f. 3, 53 (It.).

¹⁸⁷ *See* Gorla, *supra* note 185, at 12–13.

¹⁸⁸ *See id.*

¹⁸⁹ *See* Trib. Genova, 19 febbraio 2003, Giur. merito, 2003, I, 2439 (It.) (“The specific negotiation related to the unfair terms adopted in consumer contracts can’t be proven only by an agreement in writing over those specific unfair terms, but it must consist in an active participation of the consumer in the negotiation process from the drafting of the unfair terms. If this active participation is not proven, the unfair terms are void and null.”); *see also* Giud. Pace Strambino, 26 giugno 1997, Giur. It. 1998.

¹⁹⁰ Trib. Genova, 19 febbraio 2003, Giur. merito, 2003, I, 2439 (It.).

¹⁹¹ Giud. Pace Strambino, 26 giugno 1997, Giur. merito, 1998, I, 951 (It.).

Requiring a true interaction between businesses and consumers in drafting an adhesion contract is not feasible in the reality of adhesion contracts in general and online contracts in particular. The consequence of a “black/grey list” system, such as the one adopted in Italy, is that it is transformed in practice into a de facto “black list” system.

A far better solution would be to adopt the Article 1341 solution of the Italian Civil Code—also with reference to consumer contracts—and require businesses to have consumers specifically approve any abusive and unfair terms included in the contract. This solution might also help solve one of the main issues highlighted at the beginning of this Part—the lack of adequate notice of the existence and content of contractual terms that consumers receive in light of the current browse-wrap doctrine.¹⁹²

The double signature system of Article 1341 might be incorporated into our system under the form of alerts that might be displayed on the screen to consumers, informing them of the existence and content of unconscionable terms. These alerts should require users to click on them in order to give specific approval, in the same way that Article 1341 requires the weaker party to specifically sign the clause related to abusive and unfair terms. Only after this click would the abusive and unfair terms become binding on the consumer.¹⁹³

B. Clarity of the Content of Alerts

An alert inviting consumers to simply “read the online privacy policies” would not be an adequate alert, and it would only just slightly improve the notice given under the current browse-wrap doctrine. At the same time, complex wording would not be sufficient, either, because consumers would ignore it or fail to understand it. Thus, complex wording would not achieve the result of actual notice to consumers on the presence and content of abusive and unfair terms in the contract. This would transform online contracts into traditional adhesion contracts, and the issues related to the duty to read would just be replicated.

¹⁹² See *supra* Part II.A.

¹⁹³ In the case of a browse-wrap agreement, the alert concerning the abusive terms should be displayed the first time consumers visit a website. Any contractual term provided by the website would bind consumers only after they latter click on the alert and approve the term.

Again, the EU Directive on Unfair Terms may be a source of inspiration. Article 5 of the Directive provides that: “In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.”¹⁹⁴

While the second part of the above provision is, in fact, a replica of the *contra proferentem* doctrine broadly adopted in our system,¹⁹⁵ the first part of the Article adds something new. In view of this provision, examples of terms such as the ones provided above would not be sufficient, and companies would be required to provide much clearer wording. Instead, specific alerts or provisions such as the following would suffice: “By clicking here you agree to litigate any dispute that may arise from the use of this website before the court located in Los Angeles, CA. For more information, consult our terms of service [LINK].”

This wording would be sufficiently clear, and it would put consumers on notice of the consequences of agreeing to the contractual terms offered by the business. Consumers could then click on the hyperlink in the alert message to obtain additional information on the terms of service, but this would not affect contract formation.

C. Usability Issues

Web usability¹⁹⁶ and user experience (UX)¹⁹⁷ should be taken into account when considering new options for the law governing contract

¹⁹⁴ Council Directive 93/13, on Unfair Terms in Consumer Contracts, art. 8, 1993 O.J. (L 95) (EEC).

¹⁹⁵ See SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:12 (4th ed. 1999) (“Ambiguity—the possibility that a word or phrase in a contract might be reasonably and plausibly subject to more than one meaning—frequently occurs in the language used by the parties to express their meaning. Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter. This rule is frequently described under the Latin term of *contra proferentem*, literally, against the offeror, he who puts forth, or proffers or offers the language.”).

¹⁹⁶ *Web Usability*, WIKIPEDIA, http://en.wikipedia.org/wiki/Web_usability (last modified Dec. 19, 2014) (“Web usability is the ease of use of a website. Some broad goals of usability are the presentation of information and choices in a clear and concise way, a lack of ambiguity and the placement of important items in appropriate areas. One important element of web usability is ensuring that the content works on various devices and browsers.”).

¹⁹⁷ *User Experience*, WIKIPEDIA, http://en.wikipedia.org/wiki/User_experience (last modified Dec. 25, 2014) (“User Experience (UX) involves a person’s behaviors, attitudes,

formation online. Websites spend significant resources to refine their users' experience and most of the time the success of an online product—be it a social network, a search engine, or any other website that provides interactive services to users—depends on its usability and UX. For example, Google did not invent search engines, but it made using them particularly easy. Having a clean, white, and minimal search page—in which the only visible components are the Google logo and the search field—was central to the company's success.¹⁹⁸ The algorithm adopted by Google to rank Internet content was, of course, another relevant factor in its success.¹⁹⁹

Usability and UX are relevant to users' sign-up flow on websites such as Twitter and Facebook. These companies invest a lot of their resources perfecting the different stages through which a user is guided to create a new account.²⁰⁰ The less invasive this process is, the more users will sign up for the services provided by these companies. The more users the company has, the more opportunities for monetization the company will have.

For example, at the time of writing of this Article, any new user visiting Twitter's home page has to go through a two-step process to create a new account.²⁰¹ The first step is completed on the homepage, where the user fills in a form with their full name, e-mail, and

and emotions about using a particular product, system or service. User Experience includes the practical, experiential, affective, meaningful and valuable aspects of human-computer interaction and product ownership. Additionally, it includes a person's perceptions of system aspects such as utility, ease of use and efficiency. User Experience may be considered subjective in nature to the degree that it is about individual perception and thought with respect to the system. User Experience is dynamic as it is constantly modified over time due to changing usage circumstances and changes to individual systems as well as the wider usage context in which they can be found.”).

¹⁹⁸ Alan Siegel, *How Google Wins Over Users by Giving Them Less*, CO.DESIGN (May 20, 2013, 7:20 AM), <http://www.fastcodesign.com/1672594/how-google-wins-over-users-by-giving-them-less>.

¹⁹⁹ Linda Tischler, *The Beauty of Simplicity*, CO.DESIGN, <http://www.fastcompany.com/56804/beauty-simplicity> (last visited Nov. 13, 2014).

²⁰⁰ User onboarding and UX are extremely important design concepts and fundamental aspects that each and every Internet company has to carefully consider and plan. For an idea of the importance of these concepts, see Morgan Brown, *Stop Designing Pages and Start Designing Flows*, SMASHING MAG. (Jan. 4, 2012), <http://www.smashingmagazine.com/2012/01/04/stop-designing-pages-start-designing-flows/>. For the importance that user onboarding and experience has within Internet companies, note the recent effort by Twitter to improve these aspects of the company's website. Josh Constine, *Investors Fav Twitter's Instant Timeline Onboarding and Retention Fix, Shares Soar 7%*, TECHCRUNCH (Nov. 12, 2014), <http://techcrunch.com/2014/11/12/twitter-has-a-growth-solution/>.

²⁰¹ The description that follows is based on my experience navigating Twitter's website and status of Twitter's website and pages as of July 1, 2014.

password. At this stage, the existence of terms of service is indicated only by a hyperlink at the bottom of the page in small, white font.

The second step is completed right after clicking on the big, orange “Sign up for Twitter” button at the bottom of the form on the homepage. There, the user chooses a username. At this point, the existence of terms and their content is merely mentioned above the big, orange button that says “Create my account.” Included in a small, light gray box with dark grey text is the statement that “[b]y clicking the button, you agree to the terms below,” followed by a preview of 22 words of a 3475-word legal document. The user can scroll down the text if he or she wants to read the full terms, but the user would need to scroll roughly 86 times to cover the full text of the website’s terms of service. In Twitter’s defense, the same page displays links to the full text of terms of service, privacy policies, and cookies policies, for a total of 5725 words (excluding cookie policies, which are presented on several web pages) that the user is assumed to have read when clicking “Create my account.”

From the above example, it is clear how usability in the sign-up flow is important for Twitter. Consumers are guided flawlessly during the entire sign-up process; contract formation is never an obstacle because the existence and content of the contractual terms is just briefly displayed to consumers and never in an obstructive way. Unfortunately, this execution does not take into account the interests of consumers to be properly informed of their rights and obligations. This is where the analysis presented in the previous Part²⁰² comes to mind, and it suggests additional ideas to reform our online contract discipline and doctrine.

Under the solution proposed by this Article, Twitter should display the content of any unconscionable terms in a way that makes them clearly visible to users. The wording of the alert should be sufficiently clear as to put consumers on notice of the existence and content of these terms. Finally, consumers should be required to accept these terms by clicking on them to make them disappear, for example, or by clicking on an “OK” button placed in the same alert.

While this proposed alert may decrease the website’s usability, it is interesting to observe that websites already have to display this type of alert every time they conduct business in Europe to comply with

²⁰² See *supra* Part IV.A.

the EU Cookie Directive.²⁰³ The EU Cookie Directive provides for one single alert related to cookies. The solution proposed in this Article would require, on the contrary, alerts for each and every unconscionable term.

Websites could implement UI and UX solutions that would not affect users' experience.²⁰⁴ But it is relevant to remember that courts first endorsed adhesion contracts to allow businesses to flourish during delicate times or difficult market conditions. Websites no longer face obstacles directly connected to the innovative nature of online commerce. Therefore, it is time to remove the training wheels from the Internet bicycle and call these companies back to stricter contract formation rules, slightly adapted to the needs of this particular market.

D. Expanding the Analysis to Invasive Terms

While adopting the EU Directive's approach²⁰⁵ would allow for clearer regulation of unconscionable terms in adhesion contracts and online contracts, it would not solve the problem of invasive or unexpected terms.²⁰⁶ These terms, as explained in previous Sections of this Article,²⁰⁷ would escape from the tangle of the unconscionability doctrine mostly because they would not meet the requirements of substantive unconscionability. But consumers should still be informed of their presence, and they should specifically approve them as they would approve unconscionable terms.

At the same time, requiring businesses to alert consumers about invasive and unexpected terms may seem a stretch, as these terms may appear as less dangerous than unconscionable terms, and the adoption of measures designed for these latter terms would seem unjustified. This is not true. As previously discussed, invasive and unexpected terms may be more dangerous to consumers than the typical unconscionable term for several reasons. One of the reasons is

²⁰³ Council Directive 2009/136, on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, 2009 O.J. (L 337) 11 (EC). The EU Cookie Directive requires that websites display an alert message to inform users of the use of cookies. *Id.* Any website operating in the EU must comply with the Directive. *Id.*

²⁰⁴ For example, websites could display these alerts with different timing. Terms related to any license granted to the website on the content posted by users could be displayed, for example, after registration and only when the first content will be posted.

²⁰⁵ See *supra* Part IV.A.

²⁰⁶ See *supra* Part II.C.

²⁰⁷ See *supra* Part II.C.

the effect that social pressure has on consumers' attention span.²⁰⁸ Another reason is that current technology allows businesses to pull an unprecedented amount of information from consumers. The value that this information has on the market causes businesses to include invasive terms in as many online contracts as possible, even when such terms do not have anything to do with the cause of the contract.

However, if it is clear that invasive and unexpected terms should be subject to a regulation similar to the one governing unconscionable terms, we should decide how to legally define invasive terms. We may consider the approach taken by the United Kingdom with reference to terms that are very similar to the invasive and unexpected ones described in this Article, in particular, the UK "red hand rule" doctrine.²⁰⁹ In *Thornton v. Shoe Lane Parking*, Lord Denning reasoned that particularly onerous terms included in a contract—i.e., terms that a person would not reasonably expect in a particular contract—need to be brought especially to the attention of the consumer.²¹⁰ The name of the rule comes from Lord Denning's suggestion that these terms should be printed in a contract using red ink, with a red hand pointing to them.

Having this rule in mind, we might have any term that would not be expected by a reasonable Internet user—in a particular contract with reference to the cause of the contract—to be clearly displayed on the website in comprehensible language. And businesses should be required to obtain specific approval of this term before continuing use of the website under a system identical to the one suggested before for unconscionable terms.

The same analysis applied to abusive and unfair terms would similarly apply to invasive and unexpected terms as well. Supporters of the importance of websites' usability should not be concerned by the fact that this new approach would need multiple alerts to consumers (for unconscionable terms and for intrusive terms). In fact, as previously indicated,²¹¹ websites could divide the timing of these alerts, when possible, and give them to consumers before binding

²⁰⁸ See *supra* Part II.D.

²⁰⁹ Christian Twigg-Flesner, *The Implementation of the Unfair Contract Terms Directive in the United Kingdom*, CONTEMP. ISSUES IN L. 1, 2 n.10 and accompanying text (2007), available at <http://ssrn.com/abstract=1399631>; see generally Steve Kapnoullas & Bruce Clarke, *Incorporation of Unusual or Unreasonable Terms Into Contracts: The Red Hand Rule and Signed Documents*, 11 DEAKIN L. REV. 95 (2006).

²¹⁰ [1971] 2 Q.B. 163 (Eng.).

²¹¹ See *supra* note 193 and accompanying text.

them to contractual terms referring to specific actions to be performed on the website. For example, Twitter could alert consumers about any unconscionable terms when they create a new account. Then, before posting the first tweet, consumers would be alerted about the licensing terms that Twitter intends to enforce, and that these terms would be binding upon consumers only after they are specifically approved. If consumers do not approve these terms, they would be prohibited from posting tweets, but they would still be allowed to use other features of the website.

V

THE PROPOSED STANDARD FOR ONLINE CONTRACTS

The current doctrines of online contracts allow businesses to bind consumers to terms that consumers most likely ignore.²¹² These are unconscionable and invasive terms, deeply affecting consumers' rights.²¹³ These doctrines are based on an idea of inadequate notice and implied consent.²¹⁴ Consumers have the opportunity to challenge the validity and enforceability only of unconscionable terms, after the execution of the contract, and only by filing a claim in court based on the unconscionability doctrine.²¹⁵ This system does not work because it places the control of fairness of contractual terms in the hands of consumers who are not legally educated and that, most likely, do not want to undertake legal action against Goliath-sized businesses. Additionally, the current doctrine of unconscionability does not guarantee certainty of results, given that courts must determine unconscionability on a case-by-case basis, using factors that often have unclear contours.²¹⁶

Inspired by the approach of the European legal system on the issue of abusive and unfair contracts, and the approach of the UK on unexpected terms, this Article suggests reforming UCC section 2-302, or creating a new set of rules which shall apply to online contracts and which shall include the following:

1. A clear definition of unconscionable terms, similar to the one provided by the EU Directive on Unfair Terms under Article 3.1. The definition shall consider as unconscionable any term that (i)

²¹² See *supra* Part I.A.

²¹³ See *supra* Part II.B.

²¹⁴ See *supra* Part II.A.

²¹⁵ See *supra* Part III.A.

²¹⁶ See *supra* Part III.A.

causes significant imbalance in the parties' rights and obligations arising under the contract and (ii) damages the consumer;

2. A non-exhaustive list of terms to be considered unconscionable. This list should follow the "black list/grey list" approach adopted in some EU countries and include terms already considered in our system as unconscionable;

3. A clear definition of invasive and unexpected terms: terms that a reasonable consumer would not reasonably expect in an online contract, in light of the contract's cause, and that affect consumers' privacy and property rights;

4. A requirement that businesses alert consumers of the existence and content of any unconscionable, invasive, and unexpected term included in the contract. This alert should be worded clearly and displayed on the screen as a pop-up²¹⁷ or as a top-page banner;²¹⁸

5. A requirement that businesses obtain approval from consumers regarding the terms described in paragraph 4, by asking consumers to click on the pop-up alert or banner.

Under the newly proposed approach, businesses would be required to act before the contract is formed by properly alerting consumers about the existence and nature of abusive and unfair terms. Consumers would not be bound by unconscionable, invasive, or unexpected terms, and these terms would not be assumed to be included in the contract unless consumers specifically agree to them. Furthermore, businesses would be put on notice that terms included in the "black/grey" list are to be considered unconscionable.

CONCLUSION

The suggested proposal would deeply change the way consumers are exposed to unconscionable, invasive, and unexpected terms in online contracts. The proposal would achieve this goal by shifting the current legal doctrine from a system based on inadequate constructive notice and implied consent to a system based on actual notice and expressed consent. At the same time, this proposal does not suggest completely discarding all the efforts undertaken so far, but it suggests to change some of the ways the requirements of the doctrine of unconscionability are met and proven.

²¹⁷ A pop-up is a message displayed in a new browser's window, which is usually opened automatically once the user clicks on a specific link.

²¹⁸ A top-page banner is a message displayed at the top of a webpage, above its content.

This approach follows two different ideas. First, it tries to establish a fair balance between businesses, courts, and the legislature. It is time to force businesses to act under traditional notions of contract law. Second, it gives consumers the protection they deserve. Consumers should not be offered services under the false pretense of being free, while at the same time hiding terms from consumers that allow businesses to profit from their full profiling and tracking.

The approach proposed in this Article would allow businesses to continue using online contracts to offer and regulate their services. And it would require businesses to adopt new methods to inform consumers of abusive, unfair, invasive, and unexpected terms. Consumers would be able to make the choice whether to accept them and continue using the website, or reject them, and perhaps choose another website with more favorable terms. It is time to consider consumers as intelligent creatures and to return to them the power to determine their rights and obligations as they exist in the digital era.