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Are Browse-Wrap Agreements All They Are Wrapped Up To Be?

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I. INTRODUCTION

Electronic agreements have become omnipresent in the digital commercial marketplace.¹ Whether used to sell goods or services, or simply to define relationships, standardized electronic agreements have appeared in abundance in business-to-business or business-to-consumer transactions. Standardized electronic agreements, like their physical counterparts, offer the ability to address multiple concerns in a simple, efficient fashion.² Although electronic contracts and electronic signatures³ have been accepted and promoted by federal and state governments, many fundamental aspects of contract law have been left for the courts to wrestle with when disputes arise.⁴

Today, there are essentially two types of standardized electronic agreements: the click-through agreement and the browse-wrap agreement.⁵ A click-through agreement is usually conspicuously

1. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (applying the terms of a licensing agreement); see also Uniform Electronic Transactions Act (UETA) (1999) (state legislation), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.pdf>; Electronic Signatures in Global Commerce and National Commerce (E-SIGN), 15 U.S.C.A. § 7001 (2000) (federal legislation). Attempts to supplement the Uniform Commercial Code with the Uniform Computer Information Transaction Act (UCITA) have thus far not succeeded, except in Virginia and Maryland.

2. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981) (“Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.”); Terry J. Ilardi, *Mass Licensing—Part 1: Shrinkwraps, Clickwraps and Browsewraps*, 831 PLI/Pat. 251, 255 (June 2005).

3. This term encompasses a wide variety of marks people use to show assent.

4. *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C 04-04825, 2005 WL 756610, at *5 (N.D. Cal. Apr. 1, 2005) (“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

5. For purposes of this Article, the authors consider opt-in agreements as a type of click-through agreement because an offeree has to manifest acceptance by electronically checking a box.

presented to an offeree and requires that person to click on an acceptance icon, which evidences a manifestation of assent to be bound to the terms of a contract. On the other hand, a browse-wrap agreement is typically presented at the bottom of the Web site where acceptance is based on “use” of the site. Litigation surrounding click-through agreements surfaced first, but browse-wrap litigation soon followed. Although neither agreement is particularly new (each has appeared well in advance of the ensuing litigation), few state and federal courts have addressed the enforceability of browse-wrap agreements and the terms therein.⁶ The dearth of settled law surrounding browse-wrap agreements creates uncertainty.⁷ This Article discusses the development of browse-wrap contract law as it relates to contract formation and the enforcement of specific terms. This Article also identifies terms that have not yet led to published decisions and offers a schematic by which those terms may be considered.

6. See Ilardi, *supra* note 2, at 255.

7. See Christina Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 288-89 (2003).