

2013

# Old School “Wrap”: Exploring Traditional Contract Doctrine and Developing Law that Can Serve to Prevent Websites from Exploiting Online Consumer Data

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## Recommended Citation

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*Old School “Wrap”: Exploring Traditional Contract Doctrine and Developing Law that Can  
Serve to Prevent Websites from Exploiting Online Consumer Data*

by  
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Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
Under the direction of  
Professor Adam Candeub  
Spring, 2013

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## INTRODUCTION

One of the major legal challenges facing future generations is to clearly define the legal bounds of online activity between website users, website owners, and related third parties.<sup>1</sup> Internet activity has increased 566% percent since 2000, and now over one-third of the world's population uses the Internet.<sup>2</sup> In the United States alone, there are nearly 250 million Internet users.<sup>3</sup> The Internet's crucial role in modern life is becoming increasingly evident as people increasing go online for work, leisure, shopping, commercial dealings, news, and various forms of entertainment.<sup>4</sup> However, the tradeoff for the modern convenience and general benefits of a bustling Internet is the exposure to a number of online specific risks regarding privacy, identity theft, fraud, and various forms of cyber crime.<sup>5</sup>

One compelling example is the risk of websites and online businesses exploiting online consumer data and personal information beyond the point which any rational consumer or court would reasonably choose to allow.<sup>6</sup> Specifically, there exists the challenge of determining when a website's click-wrap,<sup>7</sup> or

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<sup>1</sup> See, e.g., *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 593-94 (2d Cir. 2002). Robert A. Hillman & Jeffrey Rachlinski, *Standard-Form Contracting In The Electronic Age*, 77 N.Y.U. L. REV. 429, 456 (2002),

<sup>2</sup> Internet Usage Statistics: Internet Usage and Population Statistics for North America, InternetWorldStats.com (June 30, 2012), [http:// www.internetworldstats.com/stats.htm](http://www.internetworldstats.com/stats.htm).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., See, e.g., Joanna Stern, *New Facebook Advertising Features Return Privacy to Forefront*, ABC NEWS, <http://abcnews.go.com/Technology/facebook-advertising-features-bring-privacy-forefront/story?id=17386543#.UWhm8ILue8Q>; TECH NEWS, DISCOVERY NEWS, *How Facebook Sells Your Personal Information*, <http://news.discovery.com/tech/gear-and-gadgets/how-facebook-sells-your-personal-information-130124.htm> (Jan. 24, 2013, 02:26 PM); John Henry Clippinger, *Facebook Is Betting Against Its Users*, Huffington Post (June 3, 2010, 12:00 PM), [http://www.huffingtonpost.com/john-henry-clippinger/facebook-is-betting-again\\_b\\_599231.html](http://www.huffingtonpost.com/john-henry-clippinger/facebook-is-betting-again_b_599231.html). Clippinger explains the “price” of Facebook, as the relinquishing of one's personal information in exchange for Facebook's tools. *Id.*; See also Mark Sullivan, PCWORLD, *Data Snatchers! The Booming Market for Your Online Identity*, [http://www.pcmag.com/article/258034/data\\_snatchers\\_the\\_booming\\_market\\_for\\_your\\_online\\_identity.html](http://www.pcmag.com/article/258034/data_snatchers_the_booming_market_for_your_online_identity.html) (June 26, 2012 8:01 AM) (explaining that, to make money, Facebook collects personal data from its users that is valuable to marketers and advertisers).

<sup>6</sup> Sullivan, *supra* note 5.

<sup>7</sup> *Specht*, 150 F.Supp.2d at 593-94 (“[A click wrap agreement] presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked.”)

browse-wrap<sup>8</sup> terms of service and resulting practices with consumer data should be declared a violation of various core principles of contract or public policy embodied in common and statutory law throughout the United States.<sup>9</sup> A clickwrap agreement is typically displayed to a user via a pop-up menu or some other message on the screen requiring the user to manifest assent to the terms of the agreement by clicking on an icon before further using the website.<sup>10</sup> The product cannot be obtained or used unless and until the icon is clicked.”<sup>11</sup> Conversely, a browse-wrap agreement does not require an affirmative action by the online consumer; instead, the consumer’s continued use of the website automatically registers as an acceptance of the terms.<sup>12</sup>

It is clear that, “[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”<sup>13</sup> The majority of online terms of service, privacy policies, and related agreements are simply standardized, or standard-form, contracts “containing set clauses, used repeatedly by a business or within a particular industry with only slight additions or modifications to meet the specific situation.”<sup>14</sup> As a general matter, this practice is justified, both in the paper and online world, because all retailers and service providers outside the realm of custom goods and services would have to exhaust enormous

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<sup>8</sup> *See id.*

<sup>9</sup> *See Hillman, supra* note 1 at 456 (“The courts have developed legal [contract] doctrines that curb from abuse largely from three sources: the unconscionability doctrine, the Restatement (Second) of Contracts section 211(3), and the doctrine of reasonable expectations.”).

<sup>10</sup> *Id.*

<sup>11</sup> *Specht*, 150 F.Supp.2d at 593-94.

<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g., Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.”) (citing Restatement (Second) of Contracts § 69(1)(a) (1981)); *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 385 (7th Cir. 2007); *One Beacon Ins. Co. v. Crowley Marine Services, Inc.*, 648 F.3d 258, 268 (5th Cir. 2011)

<sup>14</sup> Black’s Law Dictionary (9th ed. 2009).

resources to draft a personalized contract for each online visitor or consumer.<sup>15</sup> However, consumers rarely read these standardized terms of service and typically proceed by trusting that the given business has an interest in offering quality goods or services and in avoiding any practice that might dissuade consumers from engagement.<sup>16</sup> Further, websites routinely capitalize on personal data collected from consumers ranging from contact information like phone numbers and email addresses to more personalized information like hobbies, interests, and purchasing habits,<sup>17</sup> by selling marketing information or services to third parties well removed from the consumers original activity.<sup>18</sup> After this information is sent to third parties, consumers' private information is "held far away on remote network servers."<sup>19</sup> Thus, even if the user stops using a website collecting such data, the information already provided is no longer in either the user's or the website's control.<sup>20</sup>

This emerging business of selling information databases or reports on target consumers typically results only in the mild inconveniences of receiving telemarketing calls and targeted advertising; however, there are certain classes of personal data related to health, sexual preference, and similar areas of highly sensitive nature that may be discernable and exploited from a person's online activity in social media or otherwise.<sup>21</sup> Some argue that because of the inherently public nature of social media, consumers are left without any reason to complain when information they share is spread far beyond their intended audience.<sup>22</sup>

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<sup>15</sup> See Ian Ballon, E-COMMERCE AND INTERNET LAW § 27.03[2] (2001); Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 495 (2002).

<sup>16</sup> *Id.*

<sup>17</sup> See *Stern*, *supra* note 5.

<sup>18</sup> See, *id.*

<sup>19</sup> Matthew A. Goldberg, Comment, *The Googling of Online Privacy: Gmail, Search-Engine Histories and the New Frontier of Protecting Private Information on the Web*, 9 Lewis & Clark L. Rev. 249, 260 (2005).

<sup>20</sup> *Id.*

<sup>21</sup> See Fed. Trade Comm'n, FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising 42 (2009), available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf> [hereinafter *2009 FTC Behavioral Advertising Report*].

<sup>22</sup> See Yasamine Hashemi, Note, Facebook's Privacy Policy and Its Third-Party Partnerships: Lucrativity and Liability, 15 B.U. J. Sci. & Tech. L. 140, 141-42, 149, 152-53 (2009) (discussing users' critical response to certain Facebook features that share user information). One need but read the news on any given day to learn of the legal trouble in which social networks are finding themselves. See *id.* at 147-50, 153, 156 (noting the Washington Post's coverage of Facebook users' privacy concerns); Susan J. Campbell, Facebook Slapped with Class Action

However, consumer surely could not have expected by using a given website or clicking “I Agree” to terms and conditions that the website’s management could indiscriminately sell and spread information of such a sensitive nature.<sup>23</sup> Accordingly, recent polling finds that, “[h]alf of all U.S. residents who have a profile on a social networking site are concerned about their privacy”<sup>24</sup> and “with having their online activity tracked.”<sup>25</sup> The overwhelmingly majority of Americans believe that it is inherently “‘unfair’ when Internet firms relax their privacy policies after having collected personal information from users.”<sup>26</sup> While a website’s sale of information related to standard everyday items or activities may not “shock the conscience,” the spread of certain sensitive personal data surely does.<sup>27</sup> Given the uncertainty of the law of online contracts and the fact that consumers are largely unaware of how their information is collected and used, it is necessary to further explore, develop, and enforce new legal standards that determine which consumer information is legal to sell under various circumstances and which is too private or otherwise inappropriate for sale.<sup>28</sup>

However, in applying contract doctrine to online agreements, courts have wrestled mostly with issues regarding offer, acceptance, and mutual assent<sup>29</sup> without fully considering the fairness of these one-

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Lawsuit over Privacy, TMCnet.com (July 9, 2010), [http://callcenterinfo.tmcnet.com/Analysis/articles/91511-facebook-slapped-with-class-action-lawsuit-over-privacy.htm?utm\\_medium=twitter](http://callcenterinfo.tmcnet.com/Analysis/articles/91511-facebook-slapped-with-class-action-lawsuit-over-privacy.htm?utm_medium=twitter) (reporting that a 2010 lawsuit was not the first legal attack on Facebook regarding user privacy). Scholars have recognized this market as one of particular interest, and have begun to address the issue. *See id.* at 141-42 (investigating the legality of Facebook’s advertising scheme).

<sup>23</sup> *See* Jared S. Livingston, *Invasion Contracts: The Privacy Implications of Terms of Use Agreements in the Online Social Media Setting*, 21 Alb. L.J. Sci. & Tech. 591, 629 (2011)

<sup>24</sup> Mathew Ingram, Half of Those with Social Networking Profiles are Worried About Privacy, *gigaom* (July 14, 2010, 5:15 PM), <http://gigaom.com/2010/07/14/half-of-those-with-social-networking-profiles-are-worried-about-privacy/>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See* Wayne v. Staples, Inc., 37 Cal. Rptr. 3d 544, 557 (Cal. Ct. App. 2006).

<sup>29</sup> Restatement (Second) of Contracts § 19(2) (1981) (“The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”)

sided, online adhesion contracts<sup>30</sup> in light of the value derived from collecting, organizing, and consumer data.<sup>31</sup> Traditional contract and related principles, including, but not limited to, the unconscionability doctrine,<sup>32</sup> the reasonable expectations doctrine,<sup>33</sup> public policy,<sup>34</sup> and consumer protection statutes,<sup>35</sup> support the position that courts throughout the United States should set legal limits on the permissions obtained in browse-wrap agreements to prevent website owners from excessively capitalizing on sensitive personal data obtained from website users.<sup>36</sup> Part I identifies traditional contract law in the United States relevant in the general context of online clickwrap and browsewrap agreements. Part II explores the potential to improve the state of the law regarding the limits of how online entities can use personal data under the permissions granted by the consumer in a browsewrap and clickwrap agreements.

## I. BACKGROUND: CONTRACTS, PRIVACY, AND STANDARDIZED ONLINE AGREEMENTS

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<sup>30</sup> An adhesion contract is a “standard-form contract[s] prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms.” Black’s Law Dictionary (9th ed. 2009).

<sup>31</sup> See, e.g., *Sullivan*, *supra* note 5.

<sup>32</sup> See, e.g., *Amendariz v. Found. Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 113, 6 P.3d 669, 689 (2000). “Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him. The second — a principle of equity applicable to all contracts generally — is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or ‘unconscionable.’”).

<sup>33</sup> See, e.g., *Amendariz v. Found. Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 113, 6 P.3d 669, 689 (Cal. 2000) (“such a contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him”)

<sup>34</sup> See, e.g., Ty Tasker & Daryn Pakcyk, *Cyber Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 126 (2008).

<sup>35</sup> See *infra* II.C.

<sup>36</sup> See, e.g., Paul J. Morrow, J.D. Esq., *Cyberlaw: The Unconscionability / Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight*, 11 U. Pitt. J. Tech. L. Pol’y 7 (2011) (“This area of the law regarding . . . clickwrap agreements needs illumination. The perspectives on the status and extenuations of the law as the courts, legislatures, and society continue to struggle with the consistency of the common law applied to Internet transactions needs to be analyzed, debated, and communicated to our system of justice.”).



The common law definition of a "contract" is "a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."<sup>37</sup> Thus, contracts are based on an enforceable exchange of promises that is designed to protect the expectations of the contracting parties.<sup>38</sup> The Uniform Commercial Code ("UCC")<sup>39</sup> has relaxed the old formulistic standards of contract under most circumstances and instead emphasizes that the scope of a "contract" under its provisions is the entire legal obligation that results from an agreement between the contracting parties as demonstrated by their words or actions.<sup>40</sup>

#### A. Standardized Agreements and Adhesion Contracts

Standardized, or standard-form, contracts contain "set clauses, used repeatedly by a business or within a particular industry with only slight additions or modifications to meet the specific situation."<sup>41</sup> Standardized contracts can often be further characterized as contracts of adhesion when they are "prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms."<sup>42</sup> However, labeling a given agreement as "adhesive in character is not to indicate its legal effect,"<sup>43</sup> because an adhesion contract is simply one type of contract that is fully enforceable under its terms unless other facts are present "which, under established legal rules[,] legislative

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<sup>37</sup> Restatement Second, Contracts § 1 (1981).

<sup>38</sup> *Id.*

<sup>39</sup> U.C.C.

<sup>40</sup> *Id.* at § 1-201(b)(12)

<sup>41</sup> Black's Law Dictionary (9th ed. 2009).

<sup>42</sup> *Id.* In California, adhesion contracts have been defined as "standardized contract[s], imposed upon the subscribing party without an opportunity to negotiate the terms." *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 382 (Cal. Ct. App. 2001) (striking down the parties' arbitration agreement as an unconscionable adhesion contract)

<sup>43</sup> *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981).

or judicial[,] operate to render it otherwise.”<sup>44</sup> Traditionally, the enforcement of adhesion contracts or individual provisions therein is typically subject to two judicially imposed limitations: the reasonable expectations and unconscionability doctrines.<sup>45</sup>

## B. Contract Defenses to Enforcement of Standardized Contracts

When analyzing the enforceability of standardized, adhesive agreements, it is “standard contract doctrine” to examine the formation of the agreement for lack of mutual assent, unconscionability, and abuse of reasonable expectations of the parties.<sup>46</sup> The reasonable expectations doctrine provides that “a contract or provision which does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against that party.”<sup>47</sup> The unconscionability doctrine is a principle of equity that applies to all contracts: “a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or ‘unconscionable.’”<sup>48</sup>

### 1. *Lack of Mutual Assent*

Under the common law, mutual manifestation of assent was the touchstone of contract, and “the conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his

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<sup>44</sup> *Id.*

<sup>45</sup> *See infra* Subpart II.B.

<sup>46</sup> *See* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (holding that standard form contracts “are subject to judicial scrutiny for fundamental fairness.”); *Hillman*, *supra* note 1 at 456 (“The courts have developed legal [contract] doctrines that curb from abuse largely from three sources: the unconscionability doctrine, the Restatement (Second) of Contracts section 211(3), and the doctrine of reasonable expectations.”).

<sup>47</sup> *See* *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981); *Armendariz*, 6 P.3d at 689 (“[A] contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him.”).

<sup>48</sup> *Id.*

conduct that he assents.”<sup>49</sup> The notion of “blanket assent” dominates modern judicial thought regarding mutual assent in standard-form contracts.<sup>50</sup> “Blanket assent” has the practical impact that even if consumers do not read terms in a standard form agreement, courts assume “consumers comprehend the existence of the terms and agree to be bound to them.”<sup>51</sup> Thus, courts will presume consumers’ “blanket assent” to any particular details they may have ignored,<sup>52</sup> with the caveat that the formal presentation and substance of the standard contract must be reasonable for consumers to be bound by such terms.<sup>53</sup> Thus, despite the initial assumption of blanket assent, a contract can be still invalidated if it is unreasonable in either presentation or substance.<sup>54</sup>

## 2. *Unconscionability: Procedural and Substantive*

The unconscionability doctrine is codified in the UCC and state statutes throughout the country.<sup>55</sup> Generally, it provides that if courts find as a matter of law that the contract or any clause of the contract to have been unconscionable at the time it was made, the court may (1) refuse to enforce the contract, (2) enforce the remainder of the contract without the unconscionable clause, or (3) limit the application of any unconscionable clause as to avoid any unconscionable result.<sup>56</sup> The critical juncture for determining whether contract is unconscionable

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<sup>49</sup> Restatement (Second) of Contracts § 19(2) (1981)

<sup>50</sup> See, e.g., *Hillman*, *supra* note 1 at 462.

<sup>51</sup> See ); Todd D. Rakoff, *Contracts of Adhesion, An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1203 (1983) discussing Karl N. Llewelyn, *Prausnitz: The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 704 (1939) (book review) (arguing that common-law judges are ill equipped to distinguish efficient from exploitative terms in standardized contracts

<sup>52</sup> *Hillman*, *supra* note 1 at 461.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., U.C.C. § 2-302; Cal. Civ. Code § 1670.5 (West)

<sup>56</sup> See *id.*

is the moment when both parties enter it into, not whether it is unconscionable in light of subsequent events.<sup>57</sup>

There are two aspects to unconscionability: procedural and substantive unconscionability.<sup>58</sup> Procedural unconscionability “focuses on oppression or surprise due to unequal bargaining power” and substantive unconscionability focuses “on overly harsh or one-sided results.”<sup>59</sup> In order to avoid an inappropriate level of judicial subjectivity into the analysis the terms must be so inflammatory as to actually “shock the conscience.”<sup>60</sup> The terms “harsh,” “oppressive,” and “shock the conscience” are not synonymous with the term “unreasonable” in the context of substantively unconscionable contracts.<sup>61</sup> Many states require both types of unconscionability to be present, though not in equal proportions, for a contract or provision to be invalidated, while others engage in case-by-case analysis.<sup>62</sup>

The analysis for procedural unconscionability focuses on “oppression or surprise.”<sup>63</sup> “Oppression” stems from an inequality of bargaining power that leads to “no real negotiation and an absence of meaningful choice,” while surprise involves “the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them.”<sup>64</sup> In California, courts begin the procedural unconscionability analysis by asking whether the agreement is adhesive.<sup>65</sup> In *Graham v. Scissor-Tail, Inc.*,<sup>66</sup> legendary concert producer, Bill Graham, brought suit as a nonunion promoter against a musician, his booking agent, and the

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<sup>57</sup> See *American Software, Inc. v. Ali*, 54 Cal.Rptr.2d 477 (Cal. Ct. App. 1996); Cal. Civ. Code § 1670.5 (2012).

<sup>58</sup> *Id.*

<sup>59</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

<sup>60</sup> *Wayne v. Staples, Inc.*, 37 Cal. Rptr. 3d 544, 557 (Cal. Ct. App. 2006).

<sup>61</sup> *Id.*

<sup>62</sup> *Armendariz*, 6 P.3d at 689; (quoting 15 Williston on Contracts § 1763A, at 226-27 (3d ed.1972)).

<sup>63</sup> *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal.Rptr.2d 376 (2001).

<sup>64</sup> *Id.* (citing *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 486, (1982)).

<sup>65</sup> *Armendariz*, 6 P.3d at 689.

<sup>66</sup> 28 Cal. 3d 807, 623 P.2d 165 (1981)

musician's wholly-owned corporation for breach of contract, declaratory relief, and rescission.<sup>67</sup> The court found that the standard form contract between the music promoter and musical group was adhesive and that the provision requiring arbitration of disputes before the musicians' union was unconscionable and unenforceable because it designated an arbitrator who, by his status and identity, was presumptively biased in favor of one party.<sup>68</sup> The court held that designating "one of the parties as the arbitrator of all disputes arising thereunder is to this extent illusory the reason being that the party so designated will have an interest in the outcome which, in the view of the law, will render fair and reasoned decision, based on the evidence presented, a virtual impossibility."<sup>69</sup>

### 3. *Reasonable Expectations Doctrine*

The reasonable-expectations doctrine, born out of insurance law,<sup>70</sup> provides that the objectively reasonable expectations of parties to a contract will be honored "even though painstaking study of the policy provisions would have negated those expectations."<sup>71</sup> Thus, the doctrine allows courts to overturn express contract language if the term contradicts the consumer's reasonable expectations.<sup>72</sup> When applied, the doctrine of reasonable expectations requires the party in the stronger position to point out and explain unexpected terms even if they

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<sup>67</sup> *Id.* at 173.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 177.

<sup>70</sup> *See, e.g.,* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975) (quoting Rodman v. State Farm Mut. Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973)); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970); *see also* Gylar v. Mission Ins. Co., 514 P.2d 1219, 1221 (Cal. 1973); Steigler v. Ins. Co. of N. Am., 384 A.2d 398, 400, 401 (Del. Super. Ct. 1987); Home Indem. Ins. v. Merchs. Distribs., Inc., 483 N.E.2d 1099, 1101 (Mass. 1985); Meier v. N.J. Life Ins. Co., 503 A.2d 862, 869-70 (N.J. 1986); Atl. Cement Co., Inc. v. Fid. & Cas. Co. of N.Y., 459 N.Y.S.2d 425, 429 (App. Div. 1983), *aff'd*, 471 N.E.2d 142 (N.Y. 1984); Collister v. Nationwide Life Co., 388 A.2d 1346, 1351-54 (Pa. 1978).

<sup>71</sup> *See, e.g.,* Atwater Creamery Co. v. Western Nat. Mut. Ins. Co., 366 N.W.2d 271, 52 A.L.R.4th 1217 (Minn. 1985) (quoting Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv L Rev 961 (1970)); Riffe v. Home Finders Associates, Inc., 205 W. Va. 216, 517 S.E.2d 313 (1999); Westfield Ins. Companies v. Economy Fire & Cas. Co., 623 N.W.2d 871 (Iowa 2001); Whittier Properties, Inc. v. Alaska Nat. Ins. Co., 185 P.3d 84 (Alaska 2008).

<sup>72</sup> *Id.*

are stated clearly in the contract. The doctrine is a product of the reality that consumers rarely read service contracts and only intend to agree to be bound by reasonable boilerplate language,<sup>73</sup> and means that a term one party has reason to know the other party would not accept if properly informed of that term is not part of the contract.<sup>74</sup>

This rule allows courts to strike down “those terms that defeat the purpose of the deal, that are “bizarre or oppressive,” or that “conflict with bargained-for terms.”<sup>75</sup> Thus, when the offeror of the standard contract “has reason to believe that the party [accepting the contract] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”<sup>76</sup> Further, the “reason to believe” may be (1) shown by the prior negotiations, (2) inferred from the circumstances, (3) inferred from the fact that the term is bizarre or oppressive, (4) proved because the term eviscerates the non-standard terms explicitly agreed to, or (5) proved if the term eliminates the dominant purpose of the transaction.<sup>77</sup> Courts also will consider (6) whether the term can be understood if the customer does attempt to check on his rights and (7) any other facts relevant to the issue of what appellees reasonably expected in this contract.<sup>78</sup>

Courts have used this doctrine to overturn express contract language if the term contradicts the consumer’s reasonable expectations. The highest courts of Alabama, Alaska, Arizona, California, Iowa, Montana, Nebraska, Nevada, New Hampshire, and New Jersey have accepted this somewhat unclear and underdeveloped doctrine, while several others have

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<sup>73</sup> *See id.*

<sup>74</sup> *Id.*

<sup>75</sup> Restatement (Second) of Contracts § 211 cmt.f (1981); *Hillman, supra* note 1 at 459.

<sup>76</sup> *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 119 P.3d 1044 (App.2005); *see also* Restatement (Second) § 211(3)].

<sup>77</sup> *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 247–48, 119 P.3d 1044, 1050–51 (App.2005).

<sup>78</sup> *Id.*; *Flores v. ADT Sec. Services, Inc.*, CIV 10-036 TUC FRZ, 2011 WL 1211769 (D. Ariz. Jan. 31, 2011) report and recommendation adopted, CV 10-036-TUC-FRZ, 2011 WL 1211516 (D. Ariz. Mar. 31, 2011).

acknowledged it.<sup>79</sup> In these jurisdictions, the doctrine may apply despite the fact that there is no ambiguity in the policy because the doctrine is “substantive in nature and not merely a rule of construction to resolve competing interpretations of policy language.”<sup>80</sup>

Generally, the clearest application of the doctrine outside of insurance cases is in cases involving contracts of adhesion.<sup>81</sup> In *Graham v. Scissor-Tail, Inc.*,<sup>82</sup> while striking down the contract in favor of Graham due to unconscionability but holding that Bill Graham’s reasonable expectations were not contrary to the terms of the agreement, the court noted that when analyzing such contracts under the reasonable expectations doctrine, the level of notice and level of effect on the public interest are paramount considerations:

A number of the cases . . . have emphasized the aspect of notice, indicating that provisions contrary to the reasonable expectations of the “adhering” party will be denied enforcement in the absence of “plain and clear notification” and “an understanding consent.” [(citations omitted.)] The effect of an adequate notice, of course, is simply to alter preexisting expectations. Notice, in other words, is simply one of the factors albeit an extremely significant one to be weighed in assessing the reasonable expectations of the “adhering” party. . . . Another factor which may have a profound and decisive effect on the reasonable expectations of the “adhering” party is the extent to which the contract in question may be said to be one affecting the public interest.<sup>83</sup>

### C. Clickwrap and Browsewrap: Terms of Service And Privacy Policies

A click wrap agreement typically presents the user with a menu or some message on the screen that requires the user to manifest assent to the terms of the agreement by clicking on an

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<sup>79</sup> Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 828 (1990).

<sup>80</sup> *Id.*

<sup>81</sup> See *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981); *Armendariz*, 6 P.3d at 689 (“[A] contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him.”).

<sup>82</sup> 28 Cal. 3d 807, 623 P.2d 165 (1981)

<sup>83</sup> See *Graham*, 623 P.2d at 173 n. 18; *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 101, 32 Cal.Rptr. 33, 383 P.2d 441; see generally *Tobriner & Grodin, The Individual and the Public Service Enterprise in the New Industrial State* 55 Cal.L.Rev. 1247 (1967).

icon before engaging in the desired method online.<sup>84</sup> The product cannot be obtained or used unless and until the icon is clicked.”<sup>85</sup> Conversely, a browse-wrap agreement does not require an affirmative action by the online consumer and continuing to the next screen automatically registers as an acceptance of the terms.<sup>86</sup> Thus, the difference is whether the consumer had to (1) click an “accept the terms” button, which is click wrap, or (2) proceed to the next page without making an affirmative action related to the service terms, which is browse wrap.<sup>87</sup> Online “terms of service,” “privacy policy,” and related agreements are typically presented as standard form contracts in a clickwrap or browsewrap fashion.<sup>88</sup> Browsewrap and clickwrap agreements are also adhesion contracts as the website drafts the contract, presents it on a take it or leave it basis without providing the user an opportunity to negotiate the terms, presents the terms inconspicuously via a browsewrap agreement, and, as a result, prevents the consumer from having any real bargaining power or choice to the terms.<sup>89</sup>

### 1. *General Enforceability Standards for Browsewrap and Clickwrap Agreements*

Courts in some states have found that, in the Internet context, standard-form, “take it or leave it” agreements do not cause an “absence of a meaningful choice” because of the vast opportunities to contract with different online providers.<sup>90</sup> However, in other states, such as California, a contract can be procedurally unconscionable if a service provider has “overwhelming bargaining power and presents a ‘take-it-or-leave-it contract to a customer’”

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<sup>84</sup> *Id.*

<sup>85</sup> *Specht*, 150 F.Supp.2d at 593-94.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Specht*, 150 F.Supp.2d at 593-94.

<sup>89</sup> *Id.*

<sup>90</sup> *DeJohn v. TV Corp. Int'l*, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003) (holding that an online agreement was enforceable when “DeJohn has always had the option to reject Register.com’s contract and obtain domain name registration services elsewhere.”).



regardless of whether the customer has a “meaningful choice as to service providers.”<sup>91</sup> As a whole, courts have been reluctant to declare browsewrap agreements inherently invalid<sup>92</sup> and have held that the validity of a browsewrap licenses turns on whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site.<sup>93</sup>

Specifically, in cases involving online privacy policies, courts have found that broad statements of policy in browsewrap do not constitute contracts;<sup>94</sup> however, clickwrap agreements have more often been held valid by courts because of the necessity in clickwrap of affirmative action to “agree” with the terms and proceed to the website.<sup>95</sup> The law regarding browsewrap and clickwrap agreements has been developed under the precedent of cases involving shrinkwrap agreements, which are attached to software or other items sold in tangible packages.<sup>96</sup> Just as breaking the shrinkwrap seal and using the enclosed computer program after encountering notice of the existence of governing license terms has been deemed by some courts to constitute assent to those terms in the context of tangible software,<sup>97</sup> so clicking on a webpage's clickwrap button after receiving notice of the existence of license terms has been held by some courts to manifest an Internet user's assent to terms governing the use of downloadable intangible software.<sup>98</sup>

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<sup>91</sup> See *Douglas v. Talk Am. Inc.*, 495 F.3d 1062, 1068 (9th Cir. 2007).

<sup>92</sup> *Pollstar v. Gigmania Ltd.*, 170 F.Supp.2d 974, 981-82 (E.D.Cal.2000) (“As of 2000, no reported cases had ruled on the enforceability of a browse wrap license.”).

<sup>93</sup> *Burcham v. Expedia, Inc.*, 4:07CV1963 CDP, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009) (citing *Southwest Airlines Co. v. Boardfirst, LLC*, 2007 WL 4823761 at \*5 (N.D.Tex. Sept. 12, 2007); *Pollstar v. Gigmania Ltd.*, 170 F.Supp.2d 974, 982 (E.D.Cal.2000) (“[T]he browser wrap license agreement may be arguably valid and enforceable .”); *Molnar v. 1-800-Flowers. com*, 2008 WL 4772125 at \*7 (C.D.Cal.2008) (“[C]ourts have held that a party's use of a website may be sufficient to give rise to an inference of assent to the terms of use contained therein.”); *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 984 (Ill. App. Ct. 2005) (upholding an agreement where “[t]he blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract. Although there is no conspicuousness requirement, the hyperlink's contrasting blue type makes it conspicuous. . . . A person using a computer quickly learns that more information is available by clicking on a blue hyperlink.”).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *id.*

<sup>97</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996),

<sup>98</sup> *Hotmail Corp. v. Van\$ Money Pie Inc.*, 47 U.S.P.Q.2d 1020, 1025 (N.D.Cal.1d998).

## 2. “Wrap” Caselaw: Shrink, Browse, and Click

In 1996, the case *ProCD, Inc. v. Zeidenberg*, became one of the first decisions directly relevant to clickwrap and browsewrap agreements.<sup>99</sup> The case involved physical software and an accompanying shrinkwrap agreement.<sup>100</sup> The decision has heavily influenced decisions involving electronic agreements because it confirmed the enforceability of standardized electronic contracts, where the user agrees to the terms of service by clicking an “I agree” or similar icon.<sup>101</sup> The court held that because the defendant inspected the package, used the software, learned of the license, and continued to use the goods.<sup>102</sup> The shrinkwrap license was valid under U.C.C. § 2-204(1), and the defendant agreed to the terms by failing to reject the product under U.C.C. § 2-606).<sup>103</sup> Further, the court found reasonable notice of the terms to the consumer when a menu appeared with the option to accept or reject the terms.<sup>104</sup> With this foundation, courts following *ProCD* have regarded clickwrap terms as equivalent to terms in boilerplate paper contracts, and have upheld clickwrap agreements in the majority of circumstances.<sup>105</sup>

In the *CompuServe v. Patterson*<sup>106</sup> case from 1997, the Court of Appeals for the Sixth Circuit decided the first case involving an actual clickwrap agreement. CompuServe sought a

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<sup>99</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996)

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See, e.g., *Costar Realty Info., Inc.*, 612 F.Supp.2d at 670; *A.V. v. iParadigms, L.L.C.*, 544 F.Supp.2d 473, 480 (E.D.Va. 2008), rev'd in part on other grounds by *A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, 562 F.3d 630 (4th Cir.2009) These courts have concluded that by affirmatively clicking an “I Agree” box, a party demonstrates acceptance of these contracts in accordance with the posted terms. See *Koresko v. RealNetworks, Inc.*, 291 F.Supp.2d 1157, 1162 (E.D.Cal.2003) (concluding that clicking box on the screen marked, “I agree” on web site evinced express agreement to terms); *i.Lan Systems, Inc. v. Netscout Serv. Level Corp.*, 183 F.Supp.2d 328, 338 (D.Mass.2002) (clicking “I agree” box is an appropriate way to form enforceable contract); *Kraft Real Estate Investments, LLC v. HomeAway.com, Inc.*, 4:08-CV-3788, 2012 WL 220271 (D.S.C. Jan. 24, 2012), appeal dismissed (Mar. 13, 2012); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002).

<sup>106</sup> 89 F.3d 1257, 1261 (6th Cir. 1996).

declaratory judgment in Ohio that its product, CompuServe Navigator, did not infringe defendants' common law trademarks in "WinNAV," "Windows Navigator," and "FlashPoint Windows Navigator"<sup>107</sup> The court determined that defendant had reached out to Ohio to subscribe to CompuServe, entered into a contract with CompuServe to market his shareware product over the Internet, repeatedly interacted with CompuServe via file transfers, e-mail, and other communications, and prompted the filing of this law suit through his own threat to sue CompuServe.<sup>108</sup> The court assumed without further analysis that the clickwrap agreements were valid because the defendant "entered into a *written* contract with CompuServe which provided for the application of Ohio law," and the defendant had to type "'AGREE' at various points in the document, '[i]n recognition of your online agreement to all the above terms and conditions.'"<sup>109</sup>

Similarly, in 1998, the District Court for the Northern District of California in *Hotmail Corporation v. Van Money Pie Inc.*<sup>110</sup> upheld terms of service of the free e-mail site, Hotmail.<sup>111</sup> The court enjoined the defendants from sending spam in violation of Hotmail's contract, because in order to use Hotmail's service, defendants, after being given the opportunity to view the terms of service, clicked on a box indicating their acceptance of the terms. Thus, early in the development of browsewrap and clickwrap case law, courts decided to only refuse to enforce contracts against the consumer when the user was not required to assent to the terms or was asked to consent to the terms only after he downloaded the product.<sup>112</sup> For example, in *Williams*

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<sup>107</sup> *Id.* at 1261.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Hotmail Corp. v. Van\$ Money Pie Inc.*, C-98 JW PVT ENE, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998)

<sup>111</sup> *Id.*

<sup>112</sup> *See id.*

*v. America Online, Inc.*,<sup>113</sup> AOL subscribers' computers were allegedly damaged after they downloaded Version 5.0 of the AOL software, which caused unauthorized changes to the configuration of their computers such that they could not access non-AOL Internet service providers or access personal information and files.<sup>114</sup> The *Williams* court denied AOL's motion to dismiss the case based on the forum clause, because AOL only required assent to the AOL terms after the subscribers downloaded the software, and the actual language of the TOS agreement was not displayed on the computer screen until the customer specifically requested it by twice overriding the default.<sup>115</sup> The court reasoned that since the customers had not had an opportunity to review or accept the online contract before starting the download, the contract did not apply.<sup>116</sup>

In *America Online, Inc. v. Superior Court*<sup>117</sup> (“Mendoza”) from 2001, a California state appellate court refused to uphold the forum selection clause in AOL's member agreement in a class action suit where AOL users claimed that AOL charged their credit cards for membership fees after they canceled their memberships.<sup>118</sup> The court found the forum selection clause unenforceable as “unfair and unreasonable” because the legal remedies of AOL's selected forum, Virginia, were significantly less than those available in California.<sup>119</sup> In addition, the court found that enforcement of forum selection and choice of law clauses in the contract “would be the functional equivalent of a contractual waiver of the consumer protections” because one of the causes of action sought relief under California's Consumers Legal Remedies Act, which voids “any purported waiver of rights under the act as being contrary to California public policy,” and

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<sup>113</sup> *Williams v. Am. Online, Inc.*, CIV. A. 00-0962, 2001 WL 135825 (Mass. Super. Feb. 8, 2001).

<sup>114</sup> *Id.* at \*1-2.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> 90 Cal. App. 4th 1 (Cal. Ct. App. 2001).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

was thus prohibited under California law.<sup>120</sup> *Mendoza* established that forcing plaintiffs to waive their rights to a class action or remedies under California consumer law violate California public policy.<sup>121</sup>

In 2002, the Second Circuit Court of Appeals delivered the seminal opinion for clickwrap and browsewrap agreements in *Specht v. Netscape Communications Corp.*<sup>122</sup> The plaintiff downloaded “SmartDownload” from Netscape, and there was a link to a license agreement, but it was not necessary to read it or accept it to download the software.<sup>123</sup> Netscape argued that they were bound anyway and were subject to an arbitration clause in Smart Download Software End User Agreement.<sup>124</sup> The court held that “a consumer’s clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms . . . ,” because “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”<sup>125</sup> This holding came despite Netscape including a hyperlink labeled, “please review and agree to the terms of the . . . licensing agreement before downloading and using the software,” the court held that this hyperlink constituted more of an invitation than a notice to the consumer that enforceable contract terms would follow.<sup>126</sup> This case marks the clear shift towards distinguishing online activity from related in person activity in terms of the enforceability of standardized contracts.

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<sup>120</sup> *See id.*; California Civil Code §§ 1750 (2012)

<sup>121</sup> *Id.*; *Doe I v. AOL LLC*, 552 F.3d 1077, 1084 (9th Cir. 2009)

<sup>122</sup> 306 F.3d 17 (2d Cir. 2002).

<sup>123</sup> *Id.* at 35.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Specht*, 306 F.3d at 35.

In *Comb v. PayPal, Inc*<sup>127</sup> from 2002, the U.S. District Court for the Northern District of California refused to uphold the arbitration clause in PayPal's clickwrap agreement against the users who had filed the class action suit. The court determined that the PayPal contract was a contract of adhesion that was both procedurally and substantively unconscionable under California law<sup>128</sup> because the contract and arbitration clause therein:

(1) permitted PayPal to make binding amendments to the User Agreement at any time without prior notice to users; (2) permitted PayPal to freeze and hold customer funds in customer accounts until any dispute is resolved; (3) required users to bring claims individually and to arbitrate their disputes pursuant to the commercial rules of the American Arbitration Association (which the Court found seemed to be an attempt by PayPal 'to insulate itself contractually from any meaningful challenge to its alleged practices'); and (4) required users throughout the U.S. to arbitrate in California where PayPal is located.<sup>129</sup>

In 2007 in the case *Ticketmaster L.L.C. v. RMB*,<sup>130</sup> the Central District Court of California indicated that by browsing and eventually using a website repeatedly, consumers might be on adequate notice and demonstrate assent by continuing to use the site.<sup>131</sup> Further, the *Ticketmaster* court also reasoned that the clear, unambiguous nature of the terms and the equal footing of the parties in such a business to business transaction helped guide this holding.<sup>132</sup> The finding implies that had the terms been more vague or the bargaining power of the parties more uneven, then the minimal assent demonstrated by using the site might not have been enough to uphold the license.<sup>133</sup>

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<sup>127</sup> 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

<sup>128</sup> *Id.* at 1171.

<sup>129</sup> Susan E. Gindin, *Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the Ftc's Action Against Sears*, 8 NW. J. TECH. & INTELL. PROP. 1, 56 (2009).

<sup>130</sup> 507 F.Supp.2d 1096, 1107 (C.D.Cal.2007).

<sup>131</sup> *See id.* ("Having determined that Plaintiff is highly likely to succeed in showing that Defendants viewed and navigated through ticketmaster.com, the Court further concludes that Plaintiff is highly likely to succeed in showing that Defendant received notice of the Terms of Use and assented to them by actually using the website.")

<sup>132</sup> *Id.*

<sup>133</sup> *See id.*

It is also important to consider that in some cases since 2009, federal courts refused to uphold clickwrap agreements against consumers suing for privacy issues. In *Doe 1 v. AOL LLC*<sup>134</sup> an action was brought in California by AOL members alleging violations of federal electronic privacy law,<sup>135</sup> after AOL publicly made available online search records of more than 650,000 of its members. In this case, the Court of Appeals for the Ninth Circuit based its refusal to uphold the forum selection clause in AOL's member agreement on the *Mendoza* case decided eight years earlier. Next, in *Harris v. Blockbuster Inc.*<sup>136</sup> the District Court for the Northern District of Texas denied the enforceability of Blockbuster's clickwrap agreement against a consumer alleging violations by Blockbuster of the federal Video Privacy Protection Act.<sup>137</sup> Blockbuster was sharing consumer information, including plaintiff's movie selections, with third parties without first obtaining consent.<sup>138</sup> The case arose out of Blockbuster's use of Facebook's "Beacon" advertising program, where Facebook's partner companies had the opportunity to advertise by posting on individual Facebook users' "news feeds" when the individual purchases from a participating company like Blockbuster.<sup>139</sup> The court ruled in its decision that because Blockbuster reserved the exclusive right to modify the Terms and Conditions "at its sole discretion," "at any time," and because these modifications were to become effective

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<sup>134</sup> 552 F.3d 1077 (2009).

<sup>135</sup> 18 U.S.C. § 2702(a) (2006); *see infra* Subsection 1.C.3.

<sup>136</sup> 622 F. Supp. 2d 396 (N.D. Tex 2009).

<sup>137</sup> 18 U.S.C. § 2710 (2006).

<sup>138</sup> 18 U.S.C. § 2710; *Gindin, supra* note 129 ("The Act prohibits movie rental providers from disclosing consumers' personally identifiable information, including movie choices, to third parties without the informed written consent of the consumer at the time of the disclosure.").

<sup>139</sup> When the program originally launched, Facebook users had the right to opt-out, but, in response to consumer complaints, Facebook changed Beacon to an opt-in system, and later retired the system. Posting of David Sarno to L.A. Times Technology Blog, <http://latimesblogs.latimes.com/technology/2009/09/facebook-beacon-advertising.html> (Sept. 21, 2009, 6:39pm PST) (describing the pitfalls of Facebook's Beacon advertising program and its ultimate withdrawal).

immediately upon being posted on the site, Blockbuster's arbitration provision in its clickwrap agreement was found to be illusory, and thus unenforceable.<sup>140</sup>

However, in 2011, a federal district court in South Carolina ruled in the case *Kraft Real Estate Investments, LLC v. HomeAway.com, Inc*<sup>141</sup> upheld a clickwrap agreement between a real estate website and business consumers. Plaintiff businesses alleged that defendants HomeAway.com, Inc. and VRBO.com, Inc. changed the locations of their rental properties as listed in the Plaintiffs' online advertisements from “North Myrtle Beach” to “Myrtle Beach.” Further, plaintiffs alleged that defendants’ failure to send renewal notices and maintain plaintiffs' advertisements constituted a breach of the advertising contracts, leading to a decrease in rental inquiries and ultimately to lost profits.<sup>142</sup> The court found that the terms of the clickwrap agreement served as notice of the defendants practices, and the conditions were neither procedurally nor substantively unconscionable.<sup>143</sup> As first implied in *Ticketmaster L.L.C. v. RMB*,<sup>144</sup> the *Kraft* court emphasized that the holding was based in part on the fact that both parties were sophisticated business entities who are deemed capable of reading and understanding the effect of terms and conditions, and that arbitration clauses in clickwrap agreements present their own unique challenges relative to substantive provisions.<sup>145</sup> The court held that even assuming the provisions were more favorable to Defendants, “Plaintiffs were not forced to enter in to these contracts, and there were certainly other methods of advertising available.”<sup>146</sup>

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<sup>140</sup> *Harris*, 622 F. Supp. 2d at 399-400.

<sup>141</sup> 4:08-CV-3788, 2012 WL 220271 (D.S.C. Jan. 24, 2012), appeal dismissed (Mar. 13, 2012)

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at \*10.

<sup>144</sup> 507 F.Supp.2d 1096, 1107 (C.D.Cal.2007).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*



### 3. *Cyber Law and Consumer Protection Statutes: The FTC and The States*

Given the vast array of federal statutory law that could conceivably be raised in a clickwrap setting, this analysis focuses more on identifying starting points instead of fully exploring all possible claims under every possible statute. However, the cases provided do make it clear that the Federal Trade Commission (“FTC”) is the primary governmental agency actively taking on the responsibility of regulating online commerce related to clickwrap and browsewrap.<sup>147</sup> The FTC applies Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, to online companies when they make misrepresentations or fail to follow their own privacy policies.<sup>148</sup> The FTCA does not explicitly require all websites to have a privacy policy, but it does provide a means of enforcement of any existing privacy policies.<sup>149</sup> However, the FTC has also applied Section 5 to website misuse of personal information in the absence of a posted privacy policy under the “unfair” instead of the “deceptive” prong of the statute.<sup>150</sup> The FTC has indicated in recent rulings that online businesses and advertisers must obtain affirmative express consent to (or prohibition against) using sensitive data for tracking purposes.<sup>151</sup> It is unclear what exactly constitutes “sensitive data,” but the FTC holds that such data is deserving of some form of heightened protection.<sup>152</sup>

The FTC’s Behavioral Advertising Report from 2009 indicates that sensitive data categories include: “information about children and adolescents, medical information, financial information and account numbers, social security numbers, sexual orientation information,

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<sup>147</sup> See Ian Ballon, E-COMMERCE AND INTERNET LAW § 31.02[1] (2001) (discussing the FTC's preeminent role in shaping U.S. law on data privacy, unfair and deceptive advertising practices, the effect on competition from proposed mergers, and online fraud); Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 465 (1984).

<sup>148</sup> 15 U.S.C. 45 (2008).

<sup>149</sup> See *id.*

<sup>150</sup> See *In re BJ's Wholesale Club, Inc.*, 140 F.T.C. 465, 2005 FTC LEXIS 134 (2005).

<sup>151</sup> *FTC Staff Report*, *supra* note 21.

<sup>152</sup> *Id.*

government-issued identifiers, and precise geographic location.”<sup>153</sup> The FTC defines “online behavioral advertising” as “the tracking of a consumer's online activities over time - including the searches the consumer has conducted, the web pages visited, and the content viewed - in order to deliver advertising targeted to the individual consumer's interests.”<sup>154</sup> Behavioral advertising uses targeting technologies to collect information regarding a user's web-browsing behavior, such as the pages they have visited or the searches they have made, and sometimes with data collected by third parties outside the Internet, to serve ads to consumers. The FTC explains that

[P]re-checked boxes or disclosures that are buried in a privacy policy or a uniform licensing agreement are unlikely to be sufficiently prominent to obtain a consumer's “affirmative express consent.” ... Indeed, this protection is particularly important in the context of online behavioral advertising, where data collection is typically invisible to consumers who may believe that they are searching anonymously for information about medications, diseases, sexual orientation, or other highly sensitive topics.<sup>155</sup>

Clearly, “the FTC's concerns about transparency in the collection and use of consumer information, particularly sensitive information, are very similar for behavioral advertising.”<sup>156</sup>

There are several more federal statutes worth mentioning that provide laws relevant to clickwrap and browsewrap agreements. The “CAN-SPAM Act”<sup>157</sup> regulates the treatment of personal information in the form of email addresses by prohibiting the sending of “unsolicited” email and of misleading header information.<sup>158</sup> The Computer Fraud and Abuse Act, originally passed in 1984, is aimed at computer hackers and prohibits unauthorized access to a “protected” computer, but the act is often criticized for being

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<sup>153</sup> *Id.* at 44.

<sup>154</sup> *Id.* at 46.

<sup>155</sup> *Id.*

<sup>156</sup> *Gindin, supra* note 129 at 56.

<sup>157</sup> 15 U.S.C. 7701, et seq., Public Law No. 108-187

<sup>158</sup> *Gindin, supra* note 129 at 56.

outdated and out of touch with modern online activity.<sup>159</sup> Title I of the Electronic Communications Privacy Act (“ECPA”) is aimed at protecting the privacy of communications by prohibiting the interception of electronic communications.<sup>160</sup> Importantly, there is a statutory exception to the Act “where one of the parties to the communication has given prior consent to such interception.”<sup>161</sup> Title II of the ECPA (known as the “Stored Communications Act”) prevents improper access to “stored” electronic communications, but it does not explicitly regulate the use of such information.<sup>162</sup> Again, there is a statutory exception for communications divulged “with the lawful consent of the originator or an addressee or intended recipient of such communication.”<sup>163</sup> Thus, there are clearly several available avenues to a federal claim against websites misusing online consumer data under various circumstances.

#### 4. *State Law*

Section 5 of the Federal Trade Commission Act (“FTCA”)<sup>164</sup> has served as a model for states to create their own laws and oversight agencies to combat unfair or deceptive trade practices, and, as a result, all fifty states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have all established laws similar to the FTCA to prevent unfair or deceptive trade practices.<sup>165</sup> California has the most developed law in this area, as there are several statutes and cases directly discussing these issues: (1) the California Consumers Legal Remedies Act (CLRA), prohibits unfair methods of competition and unfair or deceptive acts or practices

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<sup>159</sup> See McCool, Grant, *Computer Fraud and Abuse Act: The 1980s-Era Hacking Law Out Of Step With Today's Internet, Analysts Say*, HUFFINGTON POST, 29 July 2012.

<sup>160</sup> See, ECPA, Pub.L. 99–508, 100 Stat. 1848, enacted October 21, 1986, codified at 18 U.S.C. §§ 2510–2522.

<sup>161</sup> 18 U.S.C. 2511(2)(c) (“It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”)

<sup>162</sup> See 18 U.S.C. §§ 2701-12 (2008).

<sup>163</sup> *Id.*

<sup>164</sup> 15 U.S.C.A. § 57a (West)

<sup>165</sup> See, e.g., *id.*; *Casamiquela*, *supra* note 15 at 495 n. 115; *Dunbar*, *supra* note 147 at 465.

resulting in the sale of goods or services;<sup>166</sup> (2) the California Customer Records Act, which requires businesses to destroy customers' records that are no longer to be maintained, and requires businesses to maintain security procedures to protect customers' personal information;<sup>167</sup> (3) California False Advertising law;<sup>168</sup> and (4) California Unfair Competition law, which prohibits unfair, unlawful, and fraudulent business practices.<sup>169</sup>

## II. CHALLENGING ENFORCEMENT OF ONLINE AGREEMENTS

The main suggestion put forth in this analysis based on the aforementioned law is that Consumer surely could not expect by using a given website or clicking “I Agree” to terms and conditions that the website’s management could indiscriminately sell and spread information, particularly of highly sensitive nature.<sup>170</sup> While a website’s sale of information related to standard everyday items or activities may not “shock the conscience,” the spread of certain sensitive personal data surely does.<sup>171</sup> Given the uncertainty of the law of online contract and the fact that consumers practically do not gain a strong awareness of how their information is technically being collected and used, it is necessary to further explore, develop, and apply legal standards that may determine which consumer information is legal to sell under various circumstances and which is too private or otherwise inappropriate for sale.<sup>172</sup> The most likely sources of such protection are the contract theories of lack of mutual assent, unconscionability, or the reasonable expectations doctrine, the claims of invasion of privacy or unfair trade practices under federal and state statutes, and the general distinguishing principles embodied in recent caselaw concerning enforceability of clickwrap and browsewrap agreements.

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<sup>166</sup> Cal. Civ.Code § 1770.

<sup>167</sup> *Id.* § 1798.81.

<sup>168</sup> Cal. Bus. & Prof.Code § 17500 et seq.

<sup>169</sup> Cal. Bus. & Prof.Code § 17200 et seq.

<sup>170</sup> *See FTC Staff Report, supra* note 21.

<sup>171</sup> *See id.*

<sup>172</sup> *See Wayne v. Staples, Inc.*, 37 Cal. Rptr. 3d 544, 557 (Cal. Ct. App. 2006).

## A. Lack of Mutual Assent

One of the novel issues created by the internet context is whether a consumer is put on adequate notice of and demonstrates the necessary assent to the service terms when engaging in online commerce.<sup>173</sup> Thus, before examining the enforceability of given contractual language, one must determine whether a contract was even formed by the parties.<sup>174</sup> The law is currently unclear about whether a party demonstrates the requisite assent to enter a contract by clicking through a “browse-wrap” agreement, however clickwrap agreements are clearly a valid form of contract under typical circumstances.<sup>175</sup> Further, “repeat and sophisticated players will be more likely bound by more ambiguous forms of assent than will innocent ones.”<sup>176</sup> As a result, the enforceability of browsewrap and clickwrap agreements often turns on how the terms are presented on the screen, the clarity of the terms therein, the relative bargaining position of the parties, and the public policy concerns with allowing the given clause under the relevant circumstances because courts have not taken a decisive stance on this style of agreement.<sup>177</sup>

It is possible that a given website’s browse-wrap terms of service would be struck down as a failure to contract because the user did not have to manifest assent by clicking “I Agree,”

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<sup>173</sup> *Ticketmaster L.L.C. v. RMB*, 507 F.Supp.2d 1096, 1107 (C.D.Cal.2007).

<sup>174</sup> *Id.*

<sup>175</sup> See, e.g., *Chundner v. TransUnion Interactive*, 626 F. Supp. 2d 1084 (D. Or. 2009); *eBay, Inc. v. Digital Point Solutions, Inc.*, 608 F. Supp. 2d 1156 (N.D. Cal. 2009); *Exceptional Urgent Care Center I, Inc. v. Protomed Med. Mgmt. Corp.*, 2009 WL 2151181 (M.D. Fla. July 13, 2009); *Jackson v. American Plaza Corp.*, 2009 WL 1158829 (S.D.N.Y. Apr. 28, 2009) (stating “A ‘terms of use’ or ‘terms of service’ contract is often entered into by clicking an ‘I agree’ button on a webpage”); *Riggs v. MySpace*, 2009 WL 1203365 (W.D. Pa. May 1, 2009); *Davis v. Dell*, 2007 WL 4623030 (D.N.J. Dec. 28, 2007); *Hauenstein v. Softwarp Ltd*, 2007 WL 2404624 (W.D. Wash. Aug. 17, 2007) (stating, “Plaintiff’s assent to the terms of the License Agreement, manifested through his ‘clicking’ the ‘I agree’ button, binds him to the terms of the License Agreement”); *Oracle USA v. Graphnet, Inc.*, 2007 WL 485959 (N.D. Cal. Feb. 12, 2007); *Recursion Software v. Interactive Intelligence*, 425 F. Supp. 2d 756, 783 (N.D. Tex. 2006) (finding “that clickwrap licenses, such as at issue here, are valid and enforceable contracts”); *Adsit Co. v. Gustin*, 874 N.E.2d 1018 (Ind. Ct. App. 2007); *Jallali v. Nat’l Bd. of Osteopathic Med. Exam’rs*, 908 N.E.2d 1168 (Ind. Ct. App. 2009); *Fieldtech Avionics & Instruments v. ComponentControl.com*, 262 S.W.3d 813 (Tex. App. 2008).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

because the terms were not included on the sign up screen, because the hyperlink was not conspicuous enough to inform consumer of contractual terms, or because the terms were not offered until after the consumer entered all his personal information; however, the governing precedent is still developing.<sup>178</sup> The argument would be strongest if the consumer could prove that he did not and had to reason to know about the terms when joining the website, that the website never “invited” the user to accept the policy rather than requiring the user to read and agree to it before engaging with the website. Even if the agreement is not struck down as a failure to contract, the minimal level of assent demonstrated by the consumer in browsewrap cases and the accompanying holdings provide much stronger support for consumers that the assent and analysis demonstrated in clickwrap cases. Therefore, even if minimal assent is found under given circumstances, the browsewrap or clickwrap nature of a given contract still lends support to the other defenses to enforceability.<sup>179</sup>

## B. Unconscionability

Consumers may have a strong case in making a challenge based on unconscionability given the standardized, take-it-or-leave-it, adhesive nature of these online contracts, and as a result there should often be strong arguments supporting a finding of procedural unconscionability for both clickwrap and browsewrap agreements.<sup>180</sup> Substantive

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<sup>178</sup> See, e.g., *Burcham v. Expedia*, 2009 WL 586513 (E.D. Mo. Mar. 6, 2009); *Facebook v. Power Ventures*, 2009 WL 1299698 (N.D. Cal. May 11, 2009); *Riggs v. MySpace*, 2009 WL 1203365 (W.D. Pa. May 1, 2009); *Mazur v. eBay*, 2008 U.S. Dist. LEXIS 16561 (N.D. Cal. Mar. 3, 2008); *Brazil v. Dell*, 2007 U.S. Dist. LEXIS 59095 (N.D. Cal. Aug. 2, 2007); *Feldman v. Google*, 513 F. Supp. 2d 229, 239 (E.D. Pa. 2007); *Hauenstein v. Softwarp Ltd*, 2007 WL 2404624 (W.D. Wash. Aug. 17, 2007); *Krause v. Chippas*, 2007 WL 4563471 (N.D. Tex. Dec. 28, 2007); *MySpace v. TheGlobe.com*, 2007 WL 1686966 (C.D. Cal. Feb. 27, 2007); *Southwest Airlines Co. v. Boardfirst, LLC*, 2007 U.S. Dist. LEXIS 96230, 2007 WL 4823761 at \*5 (N.D. Tex. Sept. 12, 2007); *Motise v. Am. Online*, 346 F. Supp. 2d 563 (S.D.N.Y. 2004); *Adsit Co. v. Gustin*, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007); *Hotels.com v. Canales*, 195 S.W3d 147 (Tex. Ct. App. 2006).

<sup>179</sup> See *id.*

<sup>180</sup> See, e.g., *Douglas v. Talk Am. Inc.*, 495 F.3d 1062, 1068 (9th Cir. 2007); *Armendariz*, 6 P.3d at 689; (quoting 15 Williston on Contracts § 1763A, at 226-27 (3d ed.1972)).

unconscionability provides the real challenge for this argument because it deals with the unfairness of terms, which is usually open to interpretation.<sup>181</sup> However, the substantive unconscionability argument seems especially strong in the privacy setting where sensitive personal data can easily be exploited by websites because the costs and psychological strain on the consumer are going to be much higher when dealing with privacy than, for example, deciding on a forum selection or arbitration clause.<sup>182</sup> Although unconscionability is a fairly high standard that only combats acts that “shock the conscious,” it has the potential to be an availing claim for online consumers because a website’s sale and spread of highly sensitive personal data surely does “shock the conscience.”<sup>183</sup> However, it remains true that “most courts have agreed that contracts of adhesion, including privacy policies, are still enforceable notwithstanding the possibility of unconscionability,” and thus the challenge of obtaining relief in the area is still significant, despite the unconscionability arguments available.<sup>184</sup>

### C. Reasonable Expectations Doctrine

Ordinarily, a party to a standardized contract is bound by all the terms of the contract even those terms that were not bargained for, understood, or even read by the party at the time of contracting.<sup>185</sup> However, adhesive, online browse-wrap agreements appear to be highly vulnerable to a violation of the reasonable expectations doctrine because of the minimal notice and assent that occur in such dealings, the lack of sophistication legally imputed on regular consumers, and the sensitive nature of much of the information collected.<sup>186</sup> Further, given the overwhelming popularity of using various websites for an ever-expanding group activities,

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Restatement of Contracts (Second) § 211(3).

<sup>186</sup> *Livingston, supra* note 23 at 619-20.

including dating, health information, social media, and many others, it seems very possible to connect the case to the public interest in having access to websites that will not violate the users' privacy or other rights when using the information collected.<sup>187</sup> Commentators have argued that because of the inherently public, communicatory nature of social media, consumers are left without any reason to complain when information they share is spread far beyond their intended audience.<sup>188</sup> However, consumers surely could not have expected by using a given website or clicking "I Agree" to terms and conditions that the website's management could indiscriminately sell and spread information of such a sensitive nature.<sup>189</sup> Accordingly, polling finds that "[h]alf of all U.S. residents who have a profile on a social networking site are concerned about their privacy"<sup>190</sup> and "with having their online activity tracked."<sup>191</sup> Thus, because the overwhelmingly majority of Americans believe that it is inherently "unfair" when Internet firms relax their privacy policies after having collected personal information from users,<sup>192</sup> it seems that the reasonable expectations of average consumers is that their privacy should not be violated, despite the increasing frequency of this practice online. Under this argument and case law, the case of abuse of reasonable expectations

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<sup>187</sup> *Id.*

<sup>188</sup> See Yasamine Hashemi, Note, Facebook's Privacy Policy and Its Third-Party Partnerships: Lucrativity and Liability, 15 B.U. J. Sci. & Tech. L. 140, 141-42, 149, 152-53 (2009) (discussing users' critical response to certain Facebook features that share user information). One need but read the news on any given day to learn of the legal trouble in which social networks are finding themselves. See *id.* at 147-50, 153, 156 (noting the Washington Post's coverage of Facebook users' privacy concerns); Susan J. Campbell, Facebook Slapped with Class Action Lawsuit over Privacy, TMCnet.com (July 9, 2010), [http://callcenterinfo.tmcnet.com/Analysis/articles/91511-facebook-slapped-with-class-action-lawsuit-over-privacy.htm?utm\\_medium=twitter](http://callcenterinfo.tmcnet.com/Analysis/articles/91511-facebook-slapped-with-class-action-lawsuit-over-privacy.htm?utm_medium=twitter) (reporting that a 2010 lawsuit was not the first legal attack on Facebook regarding user privacy). Scholars have recognized this market as one of particular interest, and have begun to address the issue. See, e.g., Hashemi, *supra* note 42, at 141-42 (investigating the legality of Facebook's advertising scheme).

<sup>189</sup> See *Livingston*, *supra* note 23 at 629.

<sup>190</sup> Mathew Ingram, Half of Those with Social Networking Profiles are Worried About Privacy, gigaom (July 14, 2010, 5:15 PM), <http://gigaom.com/2010/07/14/half-of-those-with-social-networking-profiles-are-worried-about-privacy/>.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*



seems much easier to prove in a browsewrap case involving a non-business consumer in an area linked to a public interest.<sup>193</sup>

#### D. Violation of Statutes

Consumers have an opportunity to challenge a privacy policy if it permitted the seller to invade the consumer's privacy, but just as with typical clickwrap agreements, social networking sites have hired lawyers to draft privacy policies supported by case law and under the guidance of the FTC's commentary, so there may exist a significant challenge for consumers interested in challenging privacy policies.<sup>194</sup> However, if truly sensitive data like "information about children and adolescents, medical information, financial information and account numbers, social security numbers, sexual orientation information, government-issued identifiers, and precise geographic location" is actually compromised and used inappropriately, the FTC seems likely to find a reason to provide relief.<sup>195</sup>

#### E. Public Policy

As with all contracts, "terms of service may not be enforced due to their being in violation of a jurisdiction's public policy, as to which countless theories may apply, depending upon the jurisdiction and circumstances."<sup>196</sup> Specifically, there is "strong judicial concern for rights of consumers of goods and services against whom unexpected or oppressive provisions of standardized contracts are sought to be enforced."<sup>197</sup> Also, "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to

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<sup>193</sup> *See id.*

<sup>194</sup> *Id.*

<sup>195</sup> *See FTC Staff Report, supra* note 21.

<sup>196</sup> *See, e.g., Ty Tasker & Daryn Pakcyk, Cyber Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements, 18 ALB. L.J. SCI. & TECH. 79, 126 (2008).*

<sup>197</sup> *Wheeler v. St. Joseph Hospital, 133 Cal.Rptr. 775, 782 (Cal. Ct. App. 1976).*

disclose other relevant information, is actionable as a misrepresentation in support of a claim under the fraudulent prong of the unfair competition statute.”<sup>198</sup> Further, “[i]t is question of fact whether business practice is ‘unfair’ under the law by being ‘immoral, unethical or oppressive’ or where its harm to consumer outweighs its benefits.”<sup>199</sup> However, policy arguments should not be solely depended on for such claims and the contract theories, FTC regulations, and California state law appear to be the strongest arguments against the enforceability of clickwrap and browsewrap agreements that lead to the dissemination of private information.

## CONCLUSION

There may not be any way to completely secure proper use of the data gathered from everyday consumer Internet activity, and given the complexity and uncertainty over the governing law, it is unlikely that clear standards can emerge for all possible situations. However, the reasonable limits regarding highly private data and contract theory identified in this analysis should be emphasized by consumer advocates so that especially private information is not exploited by businesses online under the rights obtained in browsewrap or clickwrap agreements with consumers. Although these agreements are generally capable of leading to a binding contract, the shady nature of businesses collecting, organizing, and selling often highly sensitive personal data of unknowing consumer justifies the appropriate use of the doctrines of lack of mutual assent, unconscionability, the reasonable expectations doctrine, federal and state statutes, and public policy to safeguard the established rights of internet users entering into a standardized online contract.

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<sup>198</sup> *Belton v. Comcast Cable Holdings, LLC*, 60 Cal.Rptr.3d 631, 151 Cal.App.4th 1224 (App. 1 Dist. 2007).

<sup>199</sup> *Smith v. Chase Mortg. Credit Group*, E.D.Cal.2009, 653 F.Supp.2d 1035..